

John C. Cruden  
Deputy Assistant Attorney General  
Environment and Natural Resources Division  
Matthew W. Morrison  
Trial Attorney  
Environmental Enforcement Section  
U.S. Department of Justice  
Ben Franklin Station  
P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3932

William W. Mercer  
United States Attorney  
District of Montana  
Kris McLean  
Assistant United States Attorney  
District of Montana  
105 East Pine, 2<sup>nd</sup> Floor  
Missoula, Montana 59802  
(406) 542-8851

Mary Capdeville  
Special Assistant Attorney General  
Montana Dept. of Environmental Quality  
Metcalf Building; P.O. Box 20091  
Helena, Montana 59620-0901  
(406) 444-0486

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

UNITED STATES OF AMERICA  
AND THE STATE OF MONTANA,  
Plaintiffs,

v.

CIVIL ACTION NO.

ATLANTIC RICHFIELD COMPANY,  
ASARCO, AR MONTANA  
CORPORATION, MONTANA RESOURCES,  
MONTANA RESOURCES  
INCORPORATED, AND DENNIS  
WASHINGTON,  
Defendants.

**CONSENT DECREE**  
**FOR THE BUTTE MINE FLOODING SITE**

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## I. BACKGROUND

A. In 1989, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in the matter of 89-39-BU-PGH (the "Federal Action") pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9607 against the Atlantic Richfield Company ("ARCO").

B. In the Federal Action complaint, which was subsequently amended on October 14, 1992 and October 31, 1994, the United States sought recovery of past response costs and declaratory judgment of liability for future response costs paid at or in connection with the Original Portion of the Silver Bow Creek / Butte Area National Priorities List (NPL) Site, the Milltown Reservoir Sediments NPL Site (now referred to as the "Milltown Reservoir/Clark Fork River NPL Site"), and the Anaconda Smelter NPL Site. The Silver Bow Creek / Butte Area NPL Site was amended to include areas in and around Butte, Montana, as described in Paragraph L, below. For purposes of this Consent Decree, the entire Silver Bow Creek / Butte Area NPL Site is herein referred to as the SBCB Site. The Federal Action complaint did not include claims relating to the Butte Portion of the SBCB Site, which includes the Butte Mine Flooding Operable Unit and the Butte Active Mine Area Operable Unit.

C. In a prior Consent Decree entered in the Federal Action, known as the Streamside Tailings Operable Unit and Federal and Tribal Natural Resource Damages Consent Decree ("Streamside Tailings Consent Decree"), the Court ordered that claims which may be asserted for the related Butte Portion of the SBCB Site, but which are not included in the Federal Action, be subject to negotiations for resolution of CERCLA claims.

D. Accordingly, the United States, on behalf of the Administrator of EPA, is filing with this Consent Decree a new action, pursuant to Sections 106 and 107 of CERCLA, against ARCO, and five other defendants -- Montana Resources, Montana Resources, Incorporated; Dennis Washington; ARCO; Montana Corporation; and ASARCO (collectively the "MR Group"). The claims asserted by the United States include claims for, *inter alia*: (1) reimbursement of Past Response Costs paid by EPA and the Department of Justice for response actions at the Butte Mine Flooding Operable Unit and a related removal action at the Travona Shaft / West Camp Operable Unit, which is part of the Butte Mine Flooding Operable Unit (collectively the "Mine Flooding Site"), together with accrued interest; (2) a declaratory judgment regarding liability for Future Response Costs paid at the Mine Flooding Site; and (3) the performance of certain response actions at the Mine Flooding Site consistent with CERCLA's implementing regulations, which are contained in the National Contingency Plan (NCP) at 40 C.F.R. Part 300.

E. The State of Montana (the "State"), acting by and through the Montana Department of Environmental Quality ("DEQ"), has joined in the United States' complaint as a co-plaintiff, alleging claims under CERCLA and the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA), §§ 75-10-701, MCA, et seq. relating to the Mine Flooding Site.

F. For the Mine Flooding Site, EPA has named ARCO and the MR Group (collectively, the "Settling Defendants") and others as potentially responsible parties pursuant to section 107 of CERCLA, 42 U.S.C. § 9607, by notice letters issued pursuant to section 120 of CERCLA, 42 U.S.C. § 9620, by other letters, and by orders issued pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606.

G. In the Federal Action, ARCO filed counterclaims against the United States, seeking cost recovery, contribution, contractual indemnity, equitable indemnification, recoupment, and declaratory

relief. The Settling Defendants could assert similar counterclaims against the United States for the Mine Flooding Site.

H. This Consent Decree addresses only the area within the Butte Portion of the SBCB Site that comprises the Mine Flooding Site. The Butte Active Mine Area Operable Unit is being addressed administratively by EPA, with the concurrence of DEQ, in the Response Decision Document signed by EPA and DEQ on March 28, 2001 and April 2, 2001, respectively. The Response Decision Document is attached to this Consent Decree as Appendix B.

I. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified DEQ on November 16, 1998 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Mine Flooding Site and the decision to defer to DEQ responsibility for the Butte Active Mine Area Operable Unit, and EPA provided the DEQ, on behalf of the State of Montana, with an opportunity to participate in such negotiations and to be a party to this Consent Decree. DEQ has since participated in, and become a signatory to, this Consent Decree.

J. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior, the State of Montana, and the Confederated Salish and Kootenai Tribes on August 9, 2001 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal, State or Tribal trusteeship at the Mine Flooding Site. For various reasons, the State of Montana, the Confederated Salish and Kootenai Tribes, and the U. S. Department of the Interior did not participate in such negotiations as trustees and declined to join this Consent Decree.

K. By entering into this Consent Decree, the Parties do not admit any liability arising out of the transactions or occurrences either that were alleged, or could have been alleged, in the complaint or counterclaim of the above captioned action, nor do the Settling Defendants admit or acknowledge that the release or threatened release of hazardous substances at or from the Mine Flooding Site within SBCB Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

L. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the original Silver Bow Creek (SBCO) Site on the NPL, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658. As originally listed, the Silver Bow Creek Superfund Site began at the headwaters of the Silver Bow Creek, and was characterized as being 28 stream miles long. The Silver Bow Creek Superfund Site was later extended to include the Clark Fork River to the Milltown Reservoir through administrative action taken by EPA. The original Silver Bow Creek Superfund Site was amended on July 22, 1987, 52 Fed. Reg. 27627, to include large areas in and around Butte, and is now known as the Silver Bow Creek/Butte Area Superfund Site. This addition is known as the Butte Portion of the SBCB and includes the area later designated the Mine Flooding Operable Unit and other areas comprising the Mine Flooding Site. In February 1990, the Clark Fork River portion of the Silver Bow Creek/Butte Area Superfund Site was transferred to the Milltown Reservoir Sediments Superfund Site. The Mine Flooding Site remains a part of the SBCB Site.

M. In response to a release or a substantial threat of a release of hazardous substances at or from Butte portion of the SBCB Site, EPA commenced initial sampling in 1987 and initially designated Operable Units for this area. That designation included the Travona Shaft / West Camp Removal Operable Unit, which considers immediate risks from contaminated ground water in the bedrock aquifer; and the Butte Mine Flooding Remedial Operable Unit, which considers all other risks from contaminated

ground water in the bedrock aquifer. As noted above, the Travona Shaft/West Camp Removal Operable Unit is related to the Butte Mine Flooding Operable Unit and is included in the Mine Flooding Site. The Travona Shaft / West Camp Removal Operable Unit is also referred to in administrative records and prior administrative orders as the Travona Camp / West Camp System, and part of the Butte Mine Flooding Operable Unit.

N. In 1988, an Engineering Evaluation/Cost Analysis (EE/CA) was performed to evaluate site conditions and examined possible removal response actions to address rising ground water contamination in the Travona Shaft/West Camp Removal OU. An Action Memorandum selecting a removal action for the Travona Shaft/West Camp OU was issued by EPA in July, 1989. The Action Memorandum was implemented pursuant to Administrative Orders CERCLA-VIII-89-18 and CERCLA-VIII-89-19.

O. In 1990, a Remedial Investigation and Feasibility Study ("RI/FS") for the Mine Flooding Site was initiated pursuant to 40 C.F.R. § 300.430. Most activities of the RI/FS were performed by ARCO and the MR Group pursuant to Administrative Order on Consent Docket No. CERCLA-VIII-90-09. Other RI/FS activities were performed by EPA and DEQ. The RI/FS was completed in 1993.

P. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action for the Mine Flooding Site on January 27, 1994, in a major local newspaper of general circulation. DEQ concurred on the proposed plan. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

Q. The September 29, 1994 Record of Decision for the Mine Flooding Site embodies the decision by EPA on the remedial action to be implemented at the Mine Flooding Site, and is attached as Appendix A. The Mine Flooding 1994 Record of Decision incorporates the ongoing requirements of the Travona Shaft / West Camp Removal Action. The requirements of the 1994 Record of Decision have been modified in a March, 2002 Explanation of Significant Differences, which is included in Appendix A. DEQ had a reasonable opportunity to review and comment on the 1994 Record of Decision and gave its concurrence on behalf of the State of Montana. The 1994 Record of Decision includes EPA's explanation of differences between the final plan and the proposed plan as well as a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA. Initial attempts at reaching settlement for performance of the Mine Flooding 1994 Record of Decision and related claims pursuant to Section 122 of CERCLA were unsuccessful.

R. Pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, EPA, with the concurrence of the State, issued to the Settling Defendants a Unilateral Administrative Order, Docket No. CERCLA-VIII-96-19 dated October 23, 1996, for implementation of remedial design, remedial action, and operation and maintenance for the Mine Flooding Site, in accordance with the September 29, 1994 Record of Decision (“ROD”). The Settling Defendants performed, and EPA approved, work pursuant to the Order which is ongoing.

S. Based on the information presently available to EPA, EPA believes that the prior response actions have been properly conducted by the Settling Defendants, and that the Work will be properly and promptly conducted by the Settling Defendants if the Work is conducted in accordance with the requirements of this Consent Decree and its appendices.

T. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the Mine Flooding Site ROD and subsequent Explanation of Significant Differences, the response actions



performed to date by the Settling Defendants, and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

U. On November 16, 1998 the United States, the State of Montana, and ARCO lodged the Streamside Tailings Consent Decree pertaining to the Streamside Tailings Operable Unit, which comprises another part of the Silver Bow Creek/Butte Area Superfund Site. The Streamside Tailings Consent Decree, which was entered by this Court on April 19, 1999, resolved certain claims of the United States and the State pertaining to the Streamside Tailings Operable Unit and other areas within the Clark Fork Basin Superfund Sites. The Streamside Tailings Consent Decree also established a framework for ARCO and the United States to resolve the remaining claims of the United States relating to unsettled portions of the Clark Fork Basin Sites. These previously unsettled portions include the Mine Flooding Site, which is the site addressed by this Consent Decree. As agreed to by the parties to the Streamside Tailings Consent Decree, this Consent Decree addresses (1) the Past Response Costs directly associated with the Mine Flooding Site, (2) Past Response Costs that EPA has allocated to the Mine Flooding Site from SBCB Site general accounts and Clark Fork Basin general accounts, (3) Future Response Costs, including allocated costs, to be paid by EPA (which include funds transferred to the State through a Cooperative Agreement) at the Mine Flooding Site, (4) Interim Response Costs incurred by EPA (which, again, include funds transferred to the State through a Cooperative Agreement) prior to the Effective Date of this Consent Decree, and (5) Work to be performed at the Mine Flooding Site. This Consent Decree also addresses the State's claims for Future Response Costs paid at the Mine Flooding Site, and requires, inter alia, the Settling Defendants to directly reimburse the State for certain future costs that the State incurs at the Site that are not reimbursed by EPA pursuant to a cooperative agreement.

V. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent

Decree will expedite the cleanup of the Mine Flooding Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, in the public interest, and consistent with the goals of CERCLA.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and the State, and upon the Settling Defendants, as defined below, and their successors and assigns. Any change in ownership or corporate status of the Settling Defendants including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the Settling Defendants' responsibilities under this Consent Decree.

3. The Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing the Settling Defendants with respect to the Mine Flooding Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms

of this Consent Decree. The Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. The Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“ARAR” shall mean an applicable or relevant and appropriate requirement, criteria, standard, or limitation of federal or state law within the meaning of Section 121(d)(2) of CERCLA, 42 U.S.C. § 9621(d)(2), as identified in Appendix 1 of the ROD and the Explanation of Significant Differences.

"ARCO" shall mean the Defendant, Atlantic Richfield Company, its divisions and subsidiaries, including ARCO Environmental Remediation L.L.C. (AERL), and any predecessors in interest. It shall also mean any successors in interest to the extent that any such successor's liability at the Mine Flooding Site derives from the liability of the Atlantic Richfield Company, and its divisions, subsidiaries including AERL, and any predecessors in interest.

“ASARCO” shall mean the Defendant, Asarco, Incorporated, its divisions and subsidiaries, and any predecessors in interest. It shall also mean any successors in interest to the extent that any such

successor's liability at the Mine Flooding Site derives from the liability of Asarco, Incorporated, and any predecessors in interest.

"Butte Active Mine Area Operable Unit" shall mean, for purposes of this Consent Decree, the geographic area circumscribed by operating permits 0030, 0030A, 0041, and 00108 issued by the State of Montana under the Montana Metal Mine Reclamation Act, as further described in the Response Decision Document.

"CECRA" shall mean the Montana Comprehensive Environmental Cleanup and Responsibility Act, as amended, MCA §§ 75-10-701 et seq.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

"Certification of Completion" shall mean EPA's certification, in consultation with the State, pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), that the Remedial Action and any modifications thereto have been completed at the Mine Flooding Site in accordance with the requirements of CERCLA, the NCP and the ROD and any modifications thereto, including that Performance Standards for the Mine Flooding Site have been attained.

"CFRSSI LAP" shall mean the Clark Fork River Superfund Site Investigations Laboratory Analytical Protocol (ARCO/PTI, April 1992), as subsequently amended as of the Effective Date of this Consent Decree.

"CFRSSI QAPP" shall mean the Clark Fork River Superfund Site Investigations Quality Assurance Project Plan (ARCO/PTI, May 1992), as subsequently amended as of the Effective Date of this Consent Decree.

"Consent Decree" shall mean this Consent Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

"Cost Documentation" shall mean a cost package for EPA's costs which consists of applicable:

- (a) payroll information, consisting of the SCORE\$ or its current replacement report or an equivalent cost summary and all time sheets; (b) indirect cost information, consisting of an overall and an employee by employee SCORE\$ or its current replacement report or equivalent cost summary; (c) travel information, consisting of a SCORE\$ or its current replacement report or an equivalent cost summary, travel authorizations and travel vouchers or equivalent electronic summary information; (d) EPA contractor (including Contract Laboratory Program contracts) information, consisting of site and/or Operable Unit (as this term is defined below) specific vouchers, any existing progress reports, Treasury schedules, tasking documents for contractors not required to provide progress reports, Annual Allocation Reports, and the SCORE\$ or its current replacement report or an equivalent cost summary; (e) EPA Interagency Agreements ("IAGs") information, consisting of SCORE\$ or its current replacement reports or an equivalent cost summary, IAGs and any amendments thereto, invoices or the equivalent, proof of payment documents, and any existing progress reports; (f) EPA Cooperative Agreements information, consisting of SCORE\$ reports or an equivalent cost summary, cooperative agreements and any amendments thereto, drawdown documentation, State quarterly progress reports; (g) prejudgment interest information, consisting of an interest cost report showing methodologies and calculations; and (h) Operable Unit allocated cost information, consisting of a narrative of allocation methodologies and spreadsheets implementing such methodologies. Because the State has incurred costs and may continue to incur costs under cooperative agreements with EPA, which relate to or are allocated to the Mine Flooding Site, Cost Documentation for these expenditures, if requested by the Settling

Defendants, shall include (a) State contractor invoices, (b) any existing contractor progress reports, and (c) form 661 SBAS information (if not included in the State quarterly progress reports) or its equivalent.

"Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, State of Montana, or Federal holiday, the period shall run until the close of business of the next working day.

"DEQ" shall mean the Montana Department of Environmental Quality and any predecessor or successor departments or agencies of the State.

"DOJ" shall mean the United States Department of Justice and any successor department or agencies.

"Effective Date" shall mean 60 days from the date that this District Court enters the Consent Decree, unless an appeal of the entry and judgment is filed during the 60-day period; if an appeal is taken, the Effective Date shall mean the date on which the District Court's judgment is affirmed.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of that Agency.

"Explanation of Significant Differences" shall mean the EPA Explanation of Significant Differences for the Mine Flooding Site signed in March of 2002 by the Regional

Administrator, EPA Region VIII, and concurred in by DEQ on behalf of the State. The Explanation of Significant Differences is Attached as part of Appendix A.

“Federal Action” shall mean United States v. Atlantic Richfield Company, No. CV 89-039-BU-PGH (D. Mont.).

"Federal Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States, and the State via cooperative agreement expenditures, pay after the Effective Date of this Consent Decree in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs paid pursuant to Sections VII, IX, XV, and Paragraph 83 of Section XXI; and including allocable Clark Fork General and SBCB Site-wide costs. Future Response Costs shall also include all Interim Response Costs and up to \$200,000 in Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from March 31, 2000 to the Effective Date of this Consent Decree. Section XVI of this Consent Decree requires Settling Defendants to reimburse EPA for all of its Future Response Costs relating to the Mine Flooding Site, including Federal Future Response Costs paid by EPA to the State under a cooperative agreement. Future Response Costs shall not include Oversight Costs, as that term is defined in this Consent Decree, paid either by EPA directly or through a cooperative agreement with the State.

“Hazardous Substance” shall mean a hazardous substance within the meaning of Section 101(14) of CERCLA or a hazardous or deleterious substance within the meaning of Section 75-10-701(8), MCA.

"Interest" on federal claims shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). “Interest” on state claims shall mean interest as specified in Section 75-10-722, MCA, as amended.

“Interim Response Costs” shall mean all costs, including direct and indirect costs, and Butte-portion SBCB Site-wide costs and Clark Fork General costs allocated to the Mine Flooding Site that are (a) paid by the United States after March 31, 2000 and through the Effective Date of this Consent Decree, or (b) incurred prior to the Effective Date of this Consent Decree but paid after that date.

"Mine Flooding Site" shall mean the Butte Mine Flooding Operable Unit, the surface boundaries of which are depicted in Figure 1 of the ROD and which are further defined in the Response Decision Document, and which consists of: (a) the waters within the Berkeley Pit; (b) the underground mine workings hydraulically connected to the Berkeley Pit; (c) the alluvial aquifer near Berkeley Pit which drains into Berkeley Pit; (d) the bedrock aquifers, including the bedrock aquifer water in and near the Continental Pit, within the boundaries shown in Appendices A and B; (e) other contributing sources of inflow to the Berkeley Pit / East Camp system, including surface runoff, leach pad, stormwater that enters the Berkeley Pit from the Butte Priority Soils Operable Unit, tailings slurry circuit overflows, and



Horseshoe Bend surface water flows; (f) the Travona / West Camp groundwater system, except if that groundwater discharge becomes part of the Butte Priority Soils Operable Unit response actions upon approval by EPA, in consultation with the State; and (g) the surface area designated for the potential development of a sludge repository, as that area is described in the Explanation of Significant Differences.

“MR Group” shall mean Defendants Dennis Washington, Montana Resources, Montana Resources, Inc., AR Montana Corporation and Asarco Incorporated.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Operable Unit” shall mean an area, geographic or otherwise, for which there is a response action, whether removal or remedial, that is subject to a separate administrative record and response selection decision.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of Remedial Action as required under an approved Operation and Maintenance Plan.

“Oversight Costs” shall mean, for purposes of this Consent Decree only, those response costs incurred by EPA or the State (either as the lead agency or support agency) in monitoring and supervising Settling Defendants’ performance of the Work pursuant to the requirements of this Consent Decree, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Consent Decree, as well as costs incurred in

overseeing implementation of the Work, and also including allocable Clark Fork General and Silver Bow Creek / Butte Area (Butte portion) Site-wide costs; however, Oversight Costs do not include:

(1) the costs of direct action by EPA and/or the State to respond to a release, threat of release, or danger at the Mine Flooding Site;

(2) the costs of litigation or other enforcement activities relating to the Mine Flooding Site;

(3) the costs of determining the need for, or taking direct response actions by, EPA and/or the State pursuant to Sections VII (Remedy Review), XV (Emergency Response), and Section XXI (Covenants by United States and State) of this Consent Decree, except that the following costs shall be included in the definition of Oversight Costs:

(a) the costs incurred by EPA and the State in conducting the five-year reviews set forth in Section VII (Remedy Review);

(b) the costs incurred by EPA and the State in overseeing additional response actions that may be required pursuant to the five-year reviews; and

(c) the costs incurred by EPA and the State in overseeing any additional response actions pursuant to Paragraph 14 of Section VI (Performance of the Work by Settling Defendants) and Paragraphs 82(a)(vi) and 82(b)(vi) of Section XXI (Covenants Not to Sue by United States and State); and

(4) the cost of enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XIX (Dispute Resolution).

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

"Parties" shall mean the United States, the State, ARCO, Dennis Washington in his individual capacity, Montana Resources, Montana Resources Incorporated, AR Montana Corporation, and ASARCO.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that EPA paid at or in connection with the Mine Flooding Site through March 31, 2000, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date; and allocable Clark Fork General and SBCO Site-wide costs plus Interest on such costs through March 31, 2000.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in Section 11, page 49, in the "Decision Summary" portion of the ROD including Appendix 1 and 2 (ARARs including waived ground water standards for the bedrock aquifer), Exhibits 2 (Butte Mine Flooding Operable Unit Monitoring Plan), 3 (Performance Standards for Remedial Design / Remedial Action at the Mine Flooding Operable Unit), and 5 (Waterfowl Mitigation Plan) appended to the SOW, and the cleanup standards described in the Explanation of Significant Differences.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Mine Flooding Site signed on September 29, 1994, by the Regional Administrator, EPA Region VIII, and concurred on by DEQ on behalf of the State, and all attachments and amendments thereto, including the Explanation of Significant Differences. The 1994 Record of Decision is attached as part of Appendix A.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, undertaken or to be undertaken by Settling Defendants to implement the ROD, pursuant to the SOW, the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA in consultation with the State.

"Remedial Action Work Plans" shall mean the documents developed pursuant to the SOW and Paragraphs 13 and 14 of this Consent Decree and approved by EPA in consultation with the State, and any amendments thereto.

"Remedial Design" shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to Remedial Design Work Plans described in the SOW or otherwise required under this Consent Decree.

"Remedial Design Work Plans" shall mean the documents developed pursuant to the SOW and Paragraphs 12 and 14 of this Consent Decree and approved by EPA in consultation with the State, and any amendments thereto.

"Response Decision Document" shall mean the document deferring to State authority under certain conditions at the Butte Active Mine Area Operable Unit signed by

EPA and DEQ on March 28 and April 2, 2001 respectively. The Response Decision Document is Appendix B.

“Rocker Consent Decree” shall mean the consent decree entered by the District Court of Montana in the Federal Action on November 7, 2000.

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

“Settling Defendants” shall mean ARCO, ASARCO, Dennis Washington in his individual capacity, Montana Resources, Montana Resources Incorporated, and AR Montana Corporation.

“Settling Federal Agencies” shall mean the Department of Justice, the Department of Interior, the Bureau of Mines, the Bureau of Land Management, the United States Geological Survey, the United States Department of Treasury, the United States Department of Commerce, the United States Department of Agriculture, the United States Department of Agriculture Forest Service, the General Service Administration, the National Aeronautics and Space Administration, the United States Department of Defense, the Environmental Protection Agency, the United States Department of Health and Human Services, the United States Public Health Service, the Atomic Energy Commission, the Defense Minerals Exploration Administration, the Defense Minerals Administration, the Office of Minerals Exploration, and the Defense Minerals Procurement Agencies, and any predecessor and successor departments, agencies, bureaus, or services.

“Site Record” shall mean the files presently maintained either in EPA’s Montana Office records center or in the Montana Department of Environmental Quality records

center, which is designated as the repository for documents related to a particular Operable Unit that are neither privileged nor confidential, and are not contained within the administrative record for that Operable Unit.

"State" shall mean the State of Montana, including all of its departments, agencies, and instrumentalities.

"State Action" shall mean *State of Montana v. Atlantic Richfield Company*, No. CV-83-317-HLN-PGH (D. Mont.).

"State Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the State pays after the Effective Date of this Consent Decree in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, and the costs incurred pursuant to Sections VII, IX, XV, and Paragraph 83 of Section XXI. Such costs are State Future Response Costs if they are not reimbursed by EPA via cooperative agreement expenditures. Pursuant to the terms of the EPA-DEQ Mine Flooding Site Superfund Memorandum of Agreement, EPA shall endeavor to assure adequate federal funding to the State for all of these activities. Section XV of this Consent Decree requires Settling Defendants to reimburse EPA for all of its Future Response Costs and to reimburse the State for State Future Response Costs relating to the Mine Flooding Site. State Future Response Costs shall not include Oversight Costs, as that term is defined in this Consent Decree.

“Statement of Work” or “SOW” is the description of activities and schedules developed to implement the ROD. The SOW is attached to this Consent Decree as Appendix C.

“Streamside Tailings Consent Decree” shall mean the consent decree entered by the District Court of Montana in the Federal Action and in the State Action.

"Supervising Contractors" shall mean the principal contractors or Settling Defendant employees retained or utilized by Settling Defendants and approved by EPA, in consultation with the State, to supervise and direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America, including all of its departments, agencies, and instrumentalities.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous or deleterious substance" under Section 75-10-701(8), MCA.

"Work" shall mean all activities the Settling Defendants are required to perform under this Consent Decree, except those required by Section XXV (Retention of Records). “Work” does not include remedial design and remedial action activities already performed by the Settling Defendants as of the date of this Consent Decree.

## V . GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Mine Flooding Site by the past and future design and implementation of response actions at the Mine Flooding Site by the Settling Defendants, to reimburse past and future response costs of the United States and the State for the Mine Flooding Site, to resolve the claims of the United States and the State against the Settling Defendants as provided in this Consent Decree, and to resolve the claims of the Settling Defendants which could have been asserted against the United States with regard to the Mine Flooding Site.

6. Commitments by the Settling Defendants

a. The Settling Defendants have completed some remedial design and remedial construction for the Mine Flooding Site, in accordance with the ROD. The Settling Defendants are also required to perform additional Remedial Design, Remedial Action, and Operation and Maintenance (O & M) activities for the Mine Flooding Site, as set forth in the updated Statement of Work (Appendix C). The Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the ROD, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by the Settling Defendants and approved by EPA, in consultation with the State, pursuant to this Consent Decree. The Settling Defendants shall also reimburse the United States and the State for Past Response Costs, Oversight Costs, and Future Response Costs for the Mine Flooding Site as provided in this Consent Decree.



b. The obligations of Settling Defendants to finance and perform the Work and to pay amounts owed the United States and the State under this Consent Decree are joint and several. In the event of the insolvency or other failure of any one or more Settling Defendants to implement the requirements of this Consent Decree, the remaining Settling Defendants shall complete all such requirements.

7. Compliance With Applicable Law. All activities undertaken by the Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. The Settling Defendants must also comply with all ARARs as set forth in the ROD and any amendments or modifications thereto, including the Explanation of Significant Differences, and the Statement of Work attached as Appendix C to this Consent Decree. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the Clark Fork Basin Superfund Sites). Where any portion of the Work that is not on-site requires a federal or state permit or approval, the Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title

a. The Settling Defendants currently maintain surface ownership of real property within the Mine Flooding Site. Any Settling Defendant with such surface ownership of real property within the Mine Flooding Site shall file a notice with the Recorder's Office, Silver Bow County, State of Montana, to all successors-in-title that the Berkeley Pit and other related surface areas covered by the ROD are part of the Mine Flooding Site, that EPA selected a remedy for the Site on September 29, 1994, and that the Settling Defendants have entered into a Consent Decree requiring implementation of Work associated with the selected remedy. A copy of the notice to be filed has been approved by EPA. The Settling Defendants shall file a copy of the EPA-approved notice within thirty (30) days of the Effective Date of this Consent Decree. The Settling Defendants shall provide EPA and the State with a copy of the recorded notice(s) within ten (10) days of recording such notice(s).

b. At least twenty-one (21) days prior to the conveyance by any Settling Defendant of its interest in any property located within the Mine Flooding Site including, but

not limited to, fee interests, leasehold interests, and mortgage interests, that Settling Defendant shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Mine Flooding Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and/or (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "deed restrictions") pursuant to Section IX (Access and Institutional Controls). At least twenty-one (21) days prior to such conveyance, the Settling Defendant proposing any conveyance within the scope of this Paragraph shall also give written notice to EPA, the State, and the other Settling Defendants of the proposed conveyance, including the name and address of the grantee, and the date on which notice of this Consent Decree, access easements, and/or restrictive easements are given to the grantee.

c. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree, including, but not limited to, the obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendants. In no event shall the conveyance release or otherwise affect the liability of the Settling Defendants to comply with all provisions of this Consent Decree, absent the prior written consent of EPA in consultation with the State. If the United States and the State approve, the grantee may perform some or all of the Work under this Consent Decree.

## VI. PERFORMANCE OF THE WORK BY THE SETTLING DEFENDANTS

### 10. Selection of Supervising Contractors.

a. All aspects of the Work to be performed by the Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractors, the selection of which shall be subject to disapproval by EPA after a reasonable opportunity for review and comment by the State. Prior to the lodging of this Consent Decree, the Settling Defendants provided EPA with information sufficient to demonstrate the qualifications of each Settling Defendant employee and contractor which may direct or supervise the Work as one of the Supervising Contractors, and EPA approved those individuals to serve as Supervising Contractors. If, at any time after lodging of the Consent Decree, the Settling Defendants propose to change a Supervising Contractor, the Settling Defendants shall notify EPA and the State in writing of the name, title, and qualifications of each contractor or Settling Defendant employee proposed as one of the Supervising Contractors and must obtain an authorization to proceed from EPA, after a reasonable opportunity for review and comment by the State, before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify the Settling Defendants in writing. The Settling Defendants shall submit to EPA and the State a list of contractors or Settling Defendant employees, including the qualifications of each contractor or Settling Defendant employee, that would be acceptable to them within

thirty (30) days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) and Settling Defendants' employee(s) that it disapproves and an authorization to proceed with respect to any of the other contractors or Settling Defendants' employees. Settling Defendants may select any contractor or Settling Defendant employee from that list that is not disapproved and shall notify EPA and the State of the name of the contractor or Settling Defendant employee selected within twenty-one (21) days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure).

#### 11. Statement of Work

Attached to this Consent Decree as Appendix C is the Statement of Work (SOW) for the Mine Flooding ROD implementation. The Statement of Work describes the various plans, activities, and requirements that must be accomplished for implementation of the ROD. The SOW describes those activities which are already completed and those activities which have yet to be completed. All previously completed plans, reports, and requirements under the SOW are incorporated herein by reference and are enforceable under this Consent Decree.

## 12. Remedial Design.

a. Settling Defendants shall continue to design activities under previously approved Remedial Design Work Plans (RD Work Plans), in accordance with instructions previously given. The Final Design Report for the Horseshoe Bend Treatment Plant is approved by EPA in consultation with DEQ and is referenced in the SOW. Settling Defendants shall submit to EPA and the State RD Work Plans for the design of the future aspects of the Remedial Action at the Site in accordance with the SOW within the time frames specified in the SOW. The RD Work Plans shall provide for design of the remedy set forth in the ROD, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the ROD, this Consent Decree and/or the SOW. RD Work Plans previously approved by EPA shall be incorporated into and become enforceable under this Consent Decree upon the Effective Date of this Consent Decree. Future RD Work Plans shall be incorporated into and become enforceable under this Consent Decree upon approval by EPA, in consultation with the State. The Settling Defendants shall conduct all field design activities in accordance with the previously-approved Mine Flooding Operable Unit Health and Safety Plan and amendments thereto, which conforms to applicable Occupational Safety and Health Administration (OSHA), EPA, and State requirements, including, but not limited to, 29 C.F.R. Sec. 1910.120.

b. The RD Work Plans shall include plans and schedules for implementation of all remedial design tasks identified in the SOW. In addition, the RD Work Plans shall include a schedule for completion of the Remedial Action Work Plans, or as otherwise required by the SOW.

c. Upon approval of the RD Work Plans by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendants shall implement the RD Work Plans. The Settling Defendants shall submit to EPA and the State all plans, submittals and other deliverables required under all approved RD Work Plans in accordance with the approved schedule and SOW for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions).

d. The pre-final/final design submittals shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan (CQAPP); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official ("QA Official"), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.

### 13. Remedial Action.

a. Settling Defendants shall continue to construct and implement activities under previously approved Remedial Action Work Plans (RA Work Plans), in accordance with instructions previously given. Settling Defendants shall submit to EPA and the State Remedial Action Work Plans ("RA Work Plans") for the construction and implementation of the future aspects of the Remedial Action at the Site in accordance with the SOW within the schedule specified in the SOW. The RA Work Plans shall provide for construction and implementation of the remedy set forth in the ROD and achievement of the Performance

Standards, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the RD Work Plans and approved by EPA in consultation with the State. Upon its approval by EPA, the RA Work Plans shall be incorporated into and become enforceable under this Consent Decree. The Settling Defendants shall also comply with the previously-approved Health and Safety Plan, and any amendments thereto, in conducting all remedial action activities.

b. The RA Work Plans shall conform with the requirements of the SOW, and shall include, as appropriate, the following: (1) the schedule for completion of the Remedial Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required Remedial Action plans; (4) methodology for implementation of the Construction Quality Assurance Plan; (5) a groundwater monitoring plan; (6) methods for satisfying permitting requirements; (7) methodology for implementation of the approved Operation and Maintenance Plans; (8) methodology for implementation of the Contingency Plan; (9) tentative formulation of the Remedial Action Project Team; (10) construction quality control plan (by constructor); and (11) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The RA Work Plans also shall include a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Settling Defendants' Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the RA Work Plans by EPA after a reasonable opportunity for review and comment by the State, or upon the Effective Date of this Consent Decree for those RA Plans previously approved, Settling Defendants shall



implement the activities required under the RA Work Plans. The Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved RA Work Plans in accordance with the approved schedule set forth in the Remedial Action Work Plans for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA after consultation with the State, Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plans. Notwithstanding the preceding sentence, and for purposes of this Paragraph only, the following physical actions may be undertaken by the Settling Defendants without further approval by EPA: surveying, preparation of a staging area and building site; procurement and storage of construction-related materials; implementation of the BMFOU Monitoring Plan pursuant to the SOW; and implementation of the Waterfowl Mitigation Plan pursuant to the SOW.

d. The Settling Defendants shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree and/or the SOW.

e. Treated water shall be discharged to the Silver Bow Creek drainage or used for other water supply purposes. Following commencement of treatment plant operations, treated water not used for water supply purposes at that time or water supply purposes at any time thereafter shall be discharged to Silver Bow Creek. Settling Defendants shall notify EPA and DEQ prior to filing an application for a change in appropriation rights or an application for a permit pursuant to the Montana Water Use Act

(Title 85, MCA) pertaining to Mine Flooding Site water, and if requested, meet with EPA and DEQ following such filing to discuss the proposed change or permit application.

14. Additional Response Actions.

a. If EPA, in consultation with the State, determines that additional response actions or modifications to the Work specified in the SOW are necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA shall require that Settling Defendants modify the appropriate plan to reflect such additional response actions or modifications. Provided, however, that such additional response actions may only be required pursuant to this Paragraph to the extent that they are consistent with the scope of the remedy selected in the ROD.

b. For the purposes of this Consent Decree, the "scope of the remedy selected in the ROD" means the protection of groundwater resources and surface water resources at and near the Mine Flooding Site through remedial measures which include: (1) control of water inflow to the Berkeley Pit through diversion of surface water; (2) treatment of surface water collected by control of inflow to the Berkeley Pit to standards prior to discharge; (3) maintaining the water level in the bedrock system at 5410 feet as described in the ROD; (4) prevention of the release of additional contaminants into the alluvial aquifer and the Silver Bow Creek drainage basin as determined by analysis of monitoring information described in the SOW; (5) comprehensive monitoring to insure discharges to the alluvial groundwater system and Silver Bow Creek drainage basin do not occur; (6) treatment of Berkeley Pit water to standards, as required by the ROD and as clarified by

the SOW, through the design, construction, and operation of treatment systems; (7) appropriate disposal of sludge material from treatment processes; (8) treatment to standards of West Camp water, unless such water is addressed through EPA-approved systems as part of the Butte Priority Soils Operable Unit; (9) institutional controls and public education; and (10) appropriate O&M for all of the above activities. The “scope of the remedy selected in the ROD” does not include the collection or treatment of groundwater within the Mine Flooding Site except as described above in (6) and (8) of this definition.

c. If any Settling Defendant objects to any additional response actions or modifications determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XIX (Dispute Resolution) and Paragraph 67 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated into the SOW and/or related work plans in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's and the State's authority to require performance of further response actions as otherwise provided in this Consent Decree.

15. Settling Defendants acknowledge and agree that nothing in this Consent Decree, or the ROD or the remedial design or remedial action work plans previously

approved, the SOW, or the remedial design, remedial action, or O&M work plans to be developed constitutes a warranty or representation of any kind by the United States or the State that compliance with the work requirements set forth in the SOW or work plans will achieve the Performance Standards.

16. Settling Defendants shall, prior to any off-site shipment of Waste Material that is generated by the Work to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator and the State Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 100 cubic yards or 1,000 gallons. Nothing in this Paragraph is intended to, nor shall, relieve the Settling Defendants of their obligations to comply with waste shipment notification and reporting requirements under state or federal law.

a. Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Settling Defendants shall notify EPA, the State, and the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by Settling Defendants following the award of the contract for any such necessary action. Settling Defendants shall provide the information required by Paragraph 16(a) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

## VII. REMEDY REVIEW

17. Periodic Review. Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA, in consultation with the State, to conduct reviews of whether the Remedial Action performed at the Mine Flooding Site is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations. EPA shall conduct its reviews consistent with Section 121(c) of CERCLA, 42 U.S.C. Sec. 9621(c), and all applicable regulations and guidance.

18. EPA Selection of Further Response Actions. If EPA, in consultation with the State, determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the Mine Flooding Site in accordance with the requirements of CERCLA and the NCP.

19. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, shall be provided with an opportunity to comment on any further response actions proposed by EPA, in consultation with the State, as a result

of the review conducted pursuant to Section 121(c) of CERCLA, and to submit written comments for the record during the comment period.

20. Settling Defendants' Obligation To Perform Further Response Actions. In addition to requirements for further response actions contained in this Consent Decree, if EPA, in consultation with the State, selects further response actions for the Mine Flooding Site, Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 79 or Paragraph 80 (United States' and the State's Pre-certification and Post-certification Reservations) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 79 or Paragraph 80 of Section XXI (Covenants Not To Sue by United States and State) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to the whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 67 (record review).

21. Submissions of Plans. If Settling Defendants are required to perform further response actions pursuant to Paragraph 20, they shall submit to EPA for approval, in consultation with the State, a schedule and plan for such work. After approval of the schedule and plan by EPA, following a reasonable opportunity for comment by the State, Settling Defendants shall implement the plan in accordance with the provisions of this Consent Decree.

## VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

22. Settling Defendants shall use applicable portions of the approved quality assurance, quality control, and chain of custody procedures for all samples in accordance with the CFRSSI QAPP and any amendments made thereto during the course of the implementation of this Consent Decree. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA in consultation with the State shall be admissible as evidence, without objection, in any proceeding under this Consent Decree. Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA and the State pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Consent Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the CFRSSI LAP, and any amendments made thereto during the course of the implementation of this Consent Decree. Settling Defendants shall ensure that all laboratories they utilize for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Consent Decree will be conducted in accordance with the procedures set forth in the QAPP. In any State contract relating to monitoring activities performed by

MBMG under this Consent Decree, the State shall include the above-stated requirements applicable to monitoring activities to be performed by MBMG.

23. Upon request, Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Settling Defendants shall notify EPA and the State not less than ten (10) days in advance of any sample collection activity unless shorter notice is agreed to by EPA and the State. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon request, EPA shall allow Settling Defendants to take split or duplicate samples of any samples they take as part of EPA's oversight of Settling Defendants' implementation of the Work.

24. Settling Defendants shall submit to both EPA and the State one paper copy and an electronic copy of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Mine Flooding Site and/or the implementation of this Consent Decree in the next quarterly report, unless EPA after consultation with the State agrees otherwise or unless otherwise provided for in the SOW or resulting RD or RA Work Plans. In any State contract relating to monitoring activities performed by MBMG under this Consent Decree, the State shall include a requirement for MBMG to submit to EPA and the State and each of the Settling Defendants a paper copy and an electronic copy of the results of all sampling and/or tests or other data obtained or generated by MBMG with respect to the Mine Flooding Site within sixty (60) days of the date of generating or obtaining such data, unless EPA, after consultation with



the State, decides otherwise or unless otherwise provided for in the SOW or resulting RD or RA Work Plans.

25. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, CECRA, and any other applicable federal and state statutes or regulations.

#### IX. ACCESS AND INSTITUTIONAL CONTROLS

26. If any Settling Defendant owns, or has the legal ability to control access on any part of the Mine Flooding Site, or any other property where access and/or water use restrictions are needed to implement this Consent Decree, that Settling Defendant shall, with respect to those properties:

a. commencing on the date of lodging of this Consent Decree, provide the United States, the State, the other Settling Defendants, and their representatives and contractors, access at all reasonable times to the Mine Flooding Site property and any other property to which access is required for the implementation of this Consent Decree, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

(1) Monitoring the Work;

- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations relating to contamination at or near the Mine Flooding Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Mine Flooding Site;
- (6) Implementing the Work pursuant to the conditions set forth in Paragraph 83 of this Consent Decree;
- (7) Assessing Settling Defendants' compliance with this Consent Decree; and
- (8) Determining whether the Mine Flooding Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

Prior to obtaining access to the Mine Flooding Site, the United States, the State, and Settling Defendants shall consider any health and safety limitations previously identified by the other Settling Defendants for the Mine Flooding Site.

b. commencing on the date of lodging of this Consent Decree, refrain from using the Mine Flooding Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such restrictions include, but are not limited to, utilization of the ground water for potable domestic use, utilization of the Butte Active Mine Area Operable Unit for residential use, interference with or destruction of monitoring wells or equipment, and interference or destruction of any treatment plant facilities. Notwithstanding the foregoing, all mining activities regulated under State-issued permits within the Butte Active Mine Area Operable Unit, including, without limitation, reclamation, the recovery of ore from the 550-million ton ore body, the crushing and concentration of up to 70,000 tons of ore per day, and a leaching operation of approximately 350 acres shall not be considered uses that interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree. In addition, the importation of water as needed for mining activities from a source outside of the Butte Active Mine Area Operable Unit shall not be considered a use that interferes with or adversely affects the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree.

27. If any part of the Mine Flooding Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned

or controlled by persons other than Settling Defendants, Settling Defendants shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives and contractors, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26(a) of this Consent Decree; and

b. an agreement, enforceable by Settling Defendants, the State, and the United States, to abide by the obligations and restrictions established by Paragraph 26(b) of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree.

Settling Defendants have funded and shall continue to cooperate with Butte Silver Bow County (the “County”) in any proceeding (i) to adopt a controlled ground water area before the State Department of Natural Resources, in accordance with the ROD, and (ii) to enforce appropriate zoning requirements for the Mine Flooding Site, subject to agreement by Butte Silver Bow County. In addition, Settling Defendants shall fund any monitoring and enforcement of the water well use restrictions for the Mine Flooding Site that are established by the State of Montana Department of Natural Resources. Settling Defendants shall also fund Butte Silver Bow County for public education and related activities, as described in the SOW.

28. For purposes of Paragraph 27 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access agreements, land/water use restrictions, and/or deed restrictions. For the Mine Flooding Site, "reasonable sums" shall be determined by considering, among other factors, the potentially responsible party status of the current owners and the degree of general cooperation shown by these parties. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access or water use restrictions, either in the form of contractual agreements or in the form of deed restrictions running with the land. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining such access and/or water use restrictions.

29. If EPA, in consultation with the State, determines that additional land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's and the State's efforts to secure such governmental controls.

30. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable federal and state statute or regulations.

## X. REPORTING REQUIREMENTS

31. The SOW requires the Settling Defendants to submit monthly discharge monitoring reports and progress reports during construction in accordance with the SOW and Paragraph 35 of this Consent Decree. In addition to these SOW requirements and any other requirement of this Consent Decree, Settling Defendants shall submit to both EPA and the State one paper copy and one electronic copy of written quarterly Operations & Maintenance reports following construction completion that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous quarter; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous quarter; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous quarter; (d) describe all actions, including, but not limited to, data collection and implementation, of any work plans that may be required under this Consent Decree, which are scheduled for the next quarter and provide other information relating to the progress of the Work; (e) include information regarding unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the RA or RD Work Plans or other work plans or schedules that Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous quarter and those to be undertaken in the next quarter. Unless EPA agrees to an alternative schedule, Settling Defendants shall submit these progress reports to EPA and the State by the tenth day of every quarter following the

lodging of this Consent Decree until EPA notifies Settling Defendants pursuant to Paragraph 48(a) of Section XIV (Certification of Completion of the Work). If requested by EPA or the State, Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work.

32. Settling Defendants shall notify EPA and the State of any change in the schedule described in the progress report for the performance of any activity, including, but not limited to, data collection and implementation of the RD Work Plans, RA Work Plans, and O & M Plans or other work plans, no later than seven (7) days prior to the performance of the activity, unless such advance notice is impracticable, in which case notice shall be given as soon as possible, but in all instances prior to the performance of the activity.

33. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), Settling Defendants shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region VIII, United States Environmental Protection Agency. Settling Defendants shall also orally notify the State Project Coordinator within 24 hours of the onset of such an event. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

34. Within twenty (20) days of the onset of such an event, Settling Defendants shall furnish to EPA and the State a written report, signed by Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

35. Unless otherwise specifically stated, Settling Defendants shall submit to both EPA and the State one paper copy and one electronic copy of any plan, report, and data required by this Consent Decree.

36. All reports and other documents submitted by Settling Defendants to EPA and the State which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants.

#### XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

37. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within twenty-one (21) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been



disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

38. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 37(a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 37(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

39. a. Upon receipt of a notice of disapproval pursuant to Paragraph 37(d), Settling Defendants shall, within twenty-one (21) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the 21-day period (or other EPA-specified period) but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 37 and 38.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 37(d), Settling Defendants shall proceed, at the direction of EPA, in consultation with the State, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

40. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item, after consultation with the State. Settling Defendants shall implement any such plan, report, or other item as modified or developed by EPA, subject only to its right to invoke the procedures set forth in Section XIX (Dispute Resolution).

41. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

42. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

## XII. PROJECT COORDINATORS

43. Settling Defendants, EPA, and the State have already designated their respective Project Coordinators for the Mine Flooding Site, the names and addresses of which are noted in Section XXVI of this Consent Decree (Notices and Submissions). Within twenty (20) days of lodging this Consent Decree, Settling Defendants, EPA, and the State will notify each other, in writing, of the names, addresses and telephone numbers of their respective designated Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. Any successor to one of Settling Defendants' initially designated Project Coordinators shall be subject to disapproval by EPA, in consultation with the State, and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. Settling Defendants' Project Coordinators shall not be attorneys. They may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

44. EPA and the State may designate representatives, including, but not limited to, EPA and State employees, and federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project

Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Mine Flooding Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

### XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

45. a. Settling Defendants have established and shall maintain financial assurance in the amount of \$78 million for the purpose of assuring financial ability to construct, operate and maintain a wastewater treatment plant for the Horseshoe Bend flow, a contingent water treatment system for the West Camp flow, and a final treatment plant which has the ability to maintain water levels in the Berkeley Pit/East Camp System below the 5,410 foot elevation, and to perform other work described in the SOW. Such financial assurance is based on the assumptions that the initiation of construction of the Horseshoe Bend plant will occur in 2002 and that treatment of the Berkeley Pit/East Camp water will commence in 2018. Prior to the date of lodging this Consent Decree, the Settling Defendants provided the United States and the State with a financial assurance that meets these requirements and the requirements of 40 C.F.R. § 264.143(f) through a guarantee by BP Corporation North America Inc., a corporate affiliate of ARCO. This initial demonstration of the financial tests was based upon audited financial statements for calendar year 2000. As soon as audited financial statements for calendar year 2001 are available in April of 2002, the Chief Financial Officer of BP Corporation North America Inc. shall submit a letter that further demonstrates and supports this guarantee. This

submittal shall be subject to review and approval by EPA and the State, and the lack of approval from EPA and the State shall be a basis for withdrawal from the Consent Decree by the State or the United States prior to the entry of the Consent Decree.

b. Settling Defendants shall submit statements signed by a responsible corporate official conveying the information required for the selected or current method of financial assurance on an annual basis, with the first submission due on May 1, 2003. This annual update may also include a request from the Settling Defendants to reduce the amount of financial assurance set forth in Subparagraph 45(a), above, due to completed work. Upon approval of the reduced amount by EPA and the State, the Settling Defendants may reduce the amount of the financial assurance. Settling Defendants may also request a change in the form of financial assurance, provided that the new proposed amount and form of assurance meet the requirements of this Paragraph. Upon approval of the new form by EPA and the State, Settling Defendants may change the form of financial assurance. The Settling Defendants' resubmitted financial security shall be in one of the following forms:

(i) A surety bond guaranteeing performance of all Work described in Subparagraph 45(a), or for the reduced amount as approved under this Subparagraph 45(b);  
or

(ii) One or more irrevocable letters of credit equaling the total estimated cost of all Work described in Subparagraph 45(a), or equaling the reduced amount as approved under this Subparagraph 45(b);

(iii) A trust fund equaling the total estimated cost of all Work described in Subparagraph 45(a), or equaling the reduced amount as approved under this Subparagraph 45(b);

(iv) A guarantee to perform all of the Work described in Subparagraph 45(a) by a parent or affiliate corporation that meets the requirements of 40 C.F.R. § 264.143(f), and has a net worth of at least \$20 billion.

c. Any corporate guarantee provided pursuant to Subparagraph 45(b)(iv) shall be in substantial compliance with 40 C.F.R. § 264.151(h) and shall contain the following language:

Nothing contained in this guarantee shall prevent any consolidation or merger of the guarantor with or into any other corporation (whether or not affiliated with the guarantor), or successive consolidations or mergers in which the guarantor, or its successor or successors shall be a party or parties, or shall prevent any sale or conveyance of all or substantially all of the property of the guarantor to any other corporation (whether or not affiliated with the guarantor); provided, however, that the guarantor hereby covenants and agrees that upon any such consolidation, merger, sale, or conveyance, or upon any other consolidation, merger, sale or conveyance that leaves the guarantor unable to meet the requirements of 40 C.F.R. § 264.143(f) or with a net worth of less than \$20 billion, the business entity resulting from such consolidation or merger, or the business entity which shall have acquired such property or assets (or in the event of sales or conveyances of assets to more

than one business entity, the business entity acquiring the largest share of such property or assets) shall expressly assume all obligations and covenants to be performed by the guarantor under this guarantee, including the obligation to continue to meet the requirements of 40 C.F.R. § 264.143(f) and a required net worth of at least \$20 billion.

In the case of any such consolidation or merger, and upon the assumption by the successor business entity of all obligations and covenants to be performed by the guarantor, such successor business entity shall succeed to and be substituted for the guarantor with the same effect as if it had been named herein as the guarantor. In the event of such sale or conveyance, upon the assumption by the business entity acquiring such assets of all obligations and covenants to be performed by the guarantor, then the guarantor, or any successor business entity which shall theretofore have become the guarantor in the manner described in this Section, shall be discharged from all obligations and covenants under this guarantee and may be dissolved and liquidated, provided that the successor business entity meets the standards in 40 C.F.R. § 264.143(f) and has a net worth of at least \$20 billion.

The guarantor, or any successor to the guarantor, shall provide written notice to the United States and the State of any transaction in which another party is to become a successor to the guarantor, within 30 days following the closing of any such transaction. Concurrent with such notice, the guarantor or successor shall provide successor's name, state of organization, and

registered address, the name of a responsible corporate official within the successor, and a copy of any documents or agreements necessary to evidence the assumption of the guarantee. Within 90 days after the closing of any such transaction, the successor entity shall provide the information demonstrating that the successor meets the requirements of 40 C.F.R. § 264.143(f) and has a net worth of at least \$20 billion.

46. a. In the event that EPA, after a reasonable opportunity for review and comment by the State, determines at any time that the financial assurances provided pursuant to this Section no longer satisfy the requirements of Paragraph 45, Settling Defendants shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA and the State alternate financial assurance in compliance with Subparagraph 45(b) of this Consent Decree.

b. Any dispute concerning the Settling Defendants' demonstration of financial ability to complete the Work shall be subject to dispute resolution and judicial review pursuant to Paragraph 68 of this Consent Decree.

c. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.



#### XIV. CERTIFICATION OF COMPLETION

##### 47. Completion of the Remedial Action

a. Within ninety (90) days after Settling Defendants conclude that the Remedial Action has been fully performed and the Performance Standards have been attained for a period of one year at full operation following the “shakedown period of operation” for the “Horseshoe Bend Water Treatment Plant” as those terms are described in the SOW, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA, and the State. If, after the pre-certification inspection, Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, they shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and Settling Defendants’ Project Coordinators shall state that the Remedial Action has been completed in accordance with the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer, and a description of how the Performance Standards were met. The report shall contain the following statement, signed by a responsible corporate official of each Settling Defendant or Settling Defendants’ Project Coordinators:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards. Provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14(b). EPA will set forth in the notice a schedule for performance of such activities consistent with this Consent Decree or require Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions) with a copy to the State. Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants by United States and State). Certification of

Completion of the Remedial Action shall not affect Settling Defendants' remaining obligations under this Consent Decree.

48. Completion of the Work

a. Within ninety (90) days after Settling Defendants conclude that all phases of the Work (including O & M), have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA and the State. If, after the pre-certification inspection, Settling Defendants still believe that the Work has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of each Settling Defendant or Settling Defendants' Project Coordinators:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work. Provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in

Paragraph 14(b). EPA will set forth in the notice a schedule for performance of such activities consistent with this Consent Decree or require Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of Work by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify Settling Defendants in writing.

#### XV. EMERGENCY RESPONSE

49. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material at or from the Mine Flooding Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 50, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, Settling Defendants shall notify the EPA Emergency Response Unit, Region VIII. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other

applicable plans or documents required under this Consent Decree. Settling Defendants shall, in addition, immediately notify the State Project Coordinator. In the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA or, as appropriate, the State, takes such action instead, Settling Defendants shall reimburse EPA and the State all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

50. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States or the State (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Mine Flooding Site, or (b) subject to Section XXI (Covenants by the United States) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Mine Flooding Site.

#### XVI. REIMBURSEMENT OF RESPONSE COSTS

51. Past Response Costs. Within sixty (60) days of the Effective Date of this Consent Decree, Settling Defendants shall pay \$3,150,000 to the EPA Hazardous Substance Superfund, in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to DOJ account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2002v00027, the EPA Region and Site/Spill ID # 08-22, and DOJ case number 90-11-2-430. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation

Unit of the United States Attorney's Office for the District of Montana following lodging of this Consent Decree. Any payments received by DOJ after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18<sup>th</sup> Street, Denver, Colorado 80202.

52. Future Response Costs.

a. Settling Defendants shall reimburse the EPA Hazardous Substance Superfund for all Federal Future Response Costs which are not inconsistent with the National Contingency Plan. In the year following the Effective Date of this Consent Decree and in other years where Federal Future Response Costs are paid, the United States will exercise best efforts to send Settling Defendants an annual bill, including Cost Documentation, requiring payment of EPA's Future Response Costs. Any failure by the United States to provide such annual billing and/or complete Cost Documentation, however, shall not relieve Settling Defendants of any obligation under this Consent Decree. Settling Defendants shall make all payments within sixty (60) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 54. Settling Defendants shall make all payments required by this Paragraph in the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Region and Site/Spill ID # 08-22, the DOJ case number 90-11-2-430, and the name and address of the party making payment. Settling Defendants shall send the

check to the address given in the periodic billing, and shall send copies of the check to the United States as specified in Section XXVII (Notices and Submissions), to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624, and to Director of Financial Management Programs, US EPA Region 8, 999 18<sup>th</sup> Street, Denver, Colorado 80202.

b. Settling Defendants shall reimburse the State for all independently incurred State Future Response Costs which are not inconsistent with the National Contingency Plan. In the year following the Effective Date of this Consent Decree and in other years where State Future Response Costs are paid, the State will exercise best efforts to send Settling Defendants an annual bill, including Cost Documentation, requiring payment of the State's Future Response Costs. Any failure by the State to provide such annual billing and/or complete Cost Documentation, however, shall not relieve Settling Defendants of any obligation under this Consent Decree. Settling Defendants shall make all payments within sixty (60) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 54. All payments to the State of Montana under this Section shall be paid by certified or cashier's check(s) made payable to "State of Montana, Department of Environmental Quality, Environmental Quality Protection Fund." The Settling Defendants shall send the certified check(s) to the Centralized Services Division at the following address: Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. The check shall be designated as a contribution to the Environmental Quality Protection Fund, contain a citation to § 75-10-704(4)(a), MCA (2001), and contain a notation identifying the Mine Flooding Operable Unit by name. Copies of check(s) paid

pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the State of Montana as provided in Paragraph XXVII (Notices and Submissions).

53. Oversight Costs. Within 60 days of the Effective Date of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund \$5,723,000 in full satisfaction and settlement of its obligation to pay Oversight Costs for the Mine Flooding Site. Such payment shall be made by FedWire Electronic Funds Transfer (“EFT”) to a DOJ account in accordance with the procedures in Paragraph 51. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18th Street, Denver, Colorado 80202; and to the State. Amounts paid by Settling Defendants under this Paragraph 53 shall be deposited into the Mine Flooding Site Special Account and shall be retained and used to conduct or finance response actions at or in connection with the Mine Flooding Site or transferred by EPA to the EPA Hazardous Substance Superfund. Oversight Costs the United States or the State may incur for the Mine Flooding Site in excess of the amount paid by the Settling Defendants pursuant to this Paragraph shall not be recoverable from Settling Defendants except as the United States and the State may incur additional Oversight Costs based on its reserved rights to take additional actions pursuant to Section XXI (Covenants by United States and State).

54. Settling Defendants may contest payment of any Federal and State Future Response Costs under Paragraph 52 solely on the basis that: (1) the United States or the



State has made an accounting error; (2) the United States or the State is seeking reimbursement of Oversight Costs inconsistent with this Consent Decree; (3) a cost item demanded for reimbursement represents costs that are inconsistent with the NCP; or (4) EPA or the State has failed to provide complete Cost Documentation as required by Paragraph 52. The failure of the United States or the State to provide complete Cost Documentation shall not relieve Settling Defendants of any obligation under this Consent Decree, but it may provide the basis for Settling Defendants to seek, through the dispute resolution provisions of Section XIX (Dispute Resolution), a reduction in Settling Defendants' obligation to reimburse EPA or the State for those costs which Settling Defendants claim are not fully supported by Cost Documentation, as defined herein. Any objection made under this Paragraph shall be made in writing within sixty (60) days of receipt of the bill and must be sent to the United States or the State. Any such objection shall specifically identify the contested Federal and State Future Response Costs and the basis for objection. In the event of an objection, Settling Defendants shall within the 60-day period pay all uncontested Federal and State Future Response Costs to the United States or the State in the manner described in Paragraph 52 and shall initiate the dispute resolution procedures in Section XIX (Dispute Resolution). Any such payment made by Settling Defendants shall be credited by the United States or the State only to the payment of the uncontested costs. If the United States or the State prevails in the dispute, within thirty (30) days of the resolution of the dispute, Settling Defendants shall pay the sums due (with accrued Interest) to the United States or the State, in the manner described in Paragraph 52. If Settling Defendants prevail concerning any aspect of the contested costs, Settling Defendants shall pay that portion of the costs (plus associated accrued Interest) for

which it did not prevail to the United States or the State, in the manner described in Paragraph 52. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendants' obligation to reimburse the United States and the State for their respective Future Response Costs.

55. In the event that the payments required by Paragraphs 51 (Past Response Costs) and 53 (Oversight Costs) are not made within sixty (60) days of the Effective Date of this Consent Decree, or the payments required by Paragraph 52 (Future Response Costs) are not made within sixty (60) days of Settling Defendants' receipt of the bill, Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs and Oversight Costs under this Paragraph shall begin to accrue sixty (60) days after the Effective Date of this Consent Decree. The Interest on Future Response Costs shall begin to accrue 60 days after receipt by Settling Defendants of the bill submitted by EPA for such costs or as provided by State statute for State costs. Interest shall continue to accrue through the date of Settling Defendants' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States or the State by virtue of Settling Defendants' failure to make timely payments under this Section. Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 52.

56. As soon as reasonably practicable after the date of entry of this Consent Decree, the United States, on behalf of the Settling Federal Agencies, shall pay to the EPA Hazardous Substance Superfund \$100,000 in compromise and settlement of Past Response

Costs and Federal Future Response Costs and the claims identified in Paragraphs 85 and 91. If the payment to the EPA Hazardous Substances Superfund required by this Paragraph is not made as soon as reasonably practicable, the Chief, Legal Enforcement Program, EPA Region 8, may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In the event that payments required by this Paragraph are not made within 60 days of the date of entry of this Consent Decree, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), commencing on the date of entry of this Consent Decree and accruing through the date of the payment. The Parties acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. Section 1341, or any other applicable provision of law.

## XVII. INDEMNIFICATION AND INSURANCE

57. a. The United States and the State do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA or state law. Settling Defendants shall indemnify, save and hold harmless the United States and the State, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their respective officers, directors,

employees, agents, contractors, subcontractors, and any persons acting on its behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA or state law. Further, Settling Defendants agree to pay the United States and the State all costs they incur, including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Settling Defendants, their respective officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities relating to the Mine Flooding Site pursuant to this Consent Decree. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither Settling Defendants nor any such contractor shall be considered an agent of the United States or the State.

b. The United States or the State shall give Settling Defendants notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 57, and shall consult with Settling Defendants prior to settling such claim.

58. Settling Defendants waive all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State arising from or on account of any contract, agreement, or arrangement between Settling Defendants, individually or collectively, and any person for past performance or response activities at the Mine Flooding Site or performance of

activities required under this Consent Decree, including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendants and any person for performance of any activities relating to the Mine Flooding Site under this Consent Decree, including, but not limited to, claims on account of construction delays.

59. a. Prior to the lodging of this Consent Decree, Settling Defendants provided the United States and the State with information that satisfied the United States and the State as to Settling Defendants' financial resources and their collective ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit.

b. If, prior to the first anniversary of EPA's Certification of Completion of Remedial Action pursuant to Paragraph 47 of Section XIV ( Completion of the Remedial Action), any material change occurs in the financial resources of any Settling Defendant such that Settling Defendants may no longer be able to assure their ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit, Settling Defendants shall promptly notify the United States and the State in accordance with Paragraph 120 of Section XXVII (Notices and Submissions). Upon receipt of such notice, EPA may, in its sole and unreviewable discretion, after reasonable opportunity for review by the State, require Settling Defendants to obtain that insurance.

c. If, prior to the first anniversary of EPA's Certification of Completion of Remedial Action pursuant to Paragraph 47 of Section XIV ( Completion of the Remedial Action), the United States or the State obtains information regarding any material change in the financial resources of Settling Defendants that leads the United States, in consultation with the State, to believe that Settling Defendants may no longer have the financial ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit, the United States shall so notify Settling Defendants in accordance with Paragraph 120 of Section XXVII (Notices and Submissions). Settling Defendants shall have sixty (60) days after receiving any such written notice to respond and provide corrected or supplemental information or otherwise assure the United States and the State that Settling Defendants have the ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit.

d. If Settling Defendants do not satisfactorily resolve the United States' concerns that a material change has occurred in the financial resources of Settling Defendants such that Settling Defendants may no longer have the financial ability to provide the equivalent of comprehensive general liability and automobile insurance with limits of two million dollars, combined single limit, EPA, in consultation with the State and in its sole and unreviewable discretion, may require Settling Defendants to obtain such insurance which names the United States and the State as additional beneficiaries and/or additional insureds.

e. In addition, for the duration of the Consent Decree, Settling Defendants shall also satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of workers' compensation insurance for all persons performing activities required of Settling Defendants by this Consent Decree. Until EPA issues its notice of completion of remedial action pursuant to Subparagraph 47(a), Settling Defendants shall provide to EPA and the State certificates of such insurance and, if requested, a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on or before January 30<sup>th</sup>. If Settling Defendants demonstrate by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

#### XVIII. FORCE MAJEURE

60. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that Settling Defendants exercise "best efforts to fulfill the obligation" under this Paragraph includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure

event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards. A "Force Majeure" event may, however, include a labor strike or work stoppage directly related to remedial construction activities at the Mine Flooding Site.

61. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Hazardous Waste Management Division, EPA Region 8, and shall also notify orally the State Project Coordinator, within seven (7) days of when Settling Defendants first knew that the event might cause a delay. Within twelve (12) days thereafter, Settling Defendants shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants



shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by any Settling Defendant, or Settling Defendants' contractors knew or should have known.

62. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. If EPA, after a reasonable opportunity to review and comment by the State agrees that the delay or anticipated delay is attributable to a force majeure event, EPA will notify Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Settling Defendants in writing of its decision.

63. If Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the

extension sought was or will be warranted under the circumstances, that best efforts to fulfill the obligation were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 61 and 62, above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

#### XIX. DISPUTE RESOLUTION

64. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between the United States and Settling Defendants arising under or with respect to this Consent Decree. The procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations of Settling Defendants that have not been disputed in accordance with this Section. EPA's decisions under these procedures, except for EPA's final administrative decision under Paragraph 67(b), will be made in consultation with the State.

65. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party to the dispute sends the other party to the dispute a written Notice of Dispute.

66. a. In the event that the parties to the dispute cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within thirty (30) days after the conclusion of the informal negotiation period, one or more of Settling Defendants invokes the formal dispute resolution procedures of this Section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Settling Defendants. The Statement of Position shall specify Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 67 or Paragraph 68.

b. Within thirty (30) days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants EPA's Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 67 or Paragraph 68. Within thirty (30) days after receipt of EPA's Statement of Position, Settling Defendants may submit a further statement of position in reply.

c. If there is disagreement between EPA and Settling Defendants as to whether dispute resolution should proceed under Paragraph 67 or Paragraph 68, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. If Settling Defendants ultimately appeal to the Court to resolve the dispute,

the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 67 and 68.

67. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and any other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 67(a). This decision shall be binding upon Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 67(c) and (d).

c. Any administrative decision made by EPA pursuant to Paragraph 67(b) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendants with the Court and served on the Parties within twenty (20) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion within 30 days of receipt of that motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Assistant Regional Administrator for Enforcement and Environmental Justice, EPA Region 8, is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 67(a).

68. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 66, the Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, will issue a final decision resolving the dispute. The Assistant Regional Administrator's decision shall be binding on Settling Defendant unless, within twenty (20) days of receipt of the decision, Settling Defendant

files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion within 30 days of receipt of the motion.

b. Notwithstanding Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

69. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Settling Defendants under this Consent Decree, not directly in dispute, unless EPA agrees or the Court orders otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 71. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties). Stipulated penalties shall not be assessed by the United States nor paid by Settling Defendants to the extent that Settling Defendants prevail on the disputed issue.

## XX. STIPULATED PENALTIES

70. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraph 71 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to the applicable administrative orders or this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

71. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$4,000	1st through 14th day
\$5,500	15th through 30th day
\$7,500	31st day and beyond

b. Failure to comply with any of the requirements in Section VI (Performance of the Work by Settling Defendants) (except for the performance standards contained in Attachment 1 to Exhibit 3 of the SOW and the Waterfowl Mitigation Plan requirements contained in Exhibit 5 of the SOW, the violations of which are addressed in Subparagraphs

71(e) and 71(f), below), Section VII (Remedy Review), Section IX (Access and Institutional Controls), Section XIII (Assurance of Ability to Complete the Work), Section XV (Emergency Response), and Section XVI (Reimbursement of Response Costs).

c. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph d:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$2,000	1st through 14th day
\$3,500	15th through 30th day
\$5,000	31st day and beyond

d. Failure to comply with any of the requirements in Section VIII (Quality Assurance, Sampling, and Data Analysis), Section X (Reporting Requirements), Section XI (EPA Approval of Plans and Other Submissions), Section XII (Project Coordinators), Section XIV (Certification of Completion), Section XVII (Indemnification and Insurance), Section XXIV (Access to Information), Section XXV (Retention of Records), Section XVI (Notices and Submissions), and Section XXXI (Community Relations).

e. The following stipulated penalties shall accrue per violation per day for any violation of the performance standards contained in Attachment 1 to Exhibit 3 of the SOW:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	5th through 14th day



\$2,000	15th through 30th day
\$3,000	31st day and beyond

Stipulated penalties shall not accrue during the first four consecutive days of violations of any of the performance standards contained in Attachment 1 to Exhibit 3 of the SOW; provided, however, that neither the United States nor the State waive their respective rights at any time to enforce these performance standards and/or to seek civil penalties under Section 109 of CERCLA, 42 U.S.C. § 9609, for any violation of these performance standards.

f. The following stipulated penalties shall accrue per violation per day for any violation of the Waterfowl Mitigation Plan requirements contained in Exhibit 5 of the SOW:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$2,000	15th through 30th day
\$3,000	31st day and beyond

g. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 83 of Section XXI (Covenants Not to Sue by United States and State), Settling Defendants shall be liable for a stipulated penalty in the amount of \$900,000; provided, however, that this stipulated penalty shall not exceed 30% of the present value of the Work to be taken over, based on EPA's cost estimates and a discount rate of 5%.

h. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity; provided, however, that stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the twenty-first (21<sup>st</sup>) day after EPA's receipt of such submission until five days after the date that EPA notifies Settling Defendants of any deficiency; (2) with respect to a decision by the Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, under Paragraph 67(b) or 68(a) of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until five days after the date that the Assistant Regional Administrator issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court or the Court of Appeals of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until five days after the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree. Any violation of the compliance milestones set forth in Paragraph 12 (Remedial Design), however, shall not also constitute a separate violation of the compliance milestones set forth in Paragraph 13 (Remedial Action).

72. Following EPA's determination, in consultation with the State, that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance.

EPA and the State may send Settling Defendants a written demand for the payment of the penalties. Stipulated penalties shall accrue as provided in Paragraph 71 regardless of whether EPA has notified Settling Defendants of a violation.

73. All penalties accruing under this Section shall be due and payable to the United States within thirty (30) days of Settling Defendants' receipt from EPA of a demand for payment of the stipulated penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to the following addresses:

Regular Mail: Mellon Bank, Attn: Superfund Accounting, Lockbox 360859,  
Pittsburgh, PA 15251-6859; or

Federal Express, Airborne, Etc.: Mellon Bank, 3 Mellon Bank Center, Room  
#153-2713, Pittsburgh, PA 15259 REF: Lockbox 360859

Each such payment shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 08-22, the DOJ Case Number 90-11-2-430, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVII (Notices and Submissions), and to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18<sup>th</sup> Street, Denver, Colorado 80202.

74. The payment of stipulated penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

75. Penalties shall continue to accrue as provided in Paragraph 71 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, Settling Defendants shall pay accrued stipulated penalties determined to be owing to EPA within fifteen (15) days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued stipulated penalties determined by the Court to be owed to EPA within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph c, below; and

c. If the District Court's decision is appealed by any Party, Interest shall accrue on the stipulated penalties determined by the District Court to be owing to the United States. Within fifteen (15) days of receipt of the final appellate court decision, Settling Defendants shall pay all accrued stipulated penalties and Interest determined to be owed by Settling Defendants to the United States.

76. a. If Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as Interest and the cost of enforcing the requirements of this Consent Decree, including attorney's fees.

Settling Defendants shall pay Interest on the unpaid balance of any stipulated penalty, which shall begin to accrue on the date of demand made pursuant to Paragraph 73.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA; provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Consent Decree.

77. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

#### XXI. COVENANTS BY UNITED STATES AND STATE

78. a. United States' Covenant. In consideration of the actions that will be performed and the payments that will be made by Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Paragraphs 79, 80, and 82 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants, any of the Settling Defendants' parent or affiliate corporations providing the financial assurances required under Section XIII of this Consent Decree, the subsidiaries of such parent or affiliate corporations, their respective officers, directors and

employees, to the extent that the liability of such parent or affiliate companies, subsidiaries, officers, directors, and employees arises solely from their status as parent or affiliate companies, subsidiaries, officers, directors, and employees, pursuant to Sections 106, 107(a), and 113(f) of CERCLA and Sections 3004(u) and (v), 3008 and 7003 of RCRA relating to the Mine Flooding Site. Except with respect to future liability, these covenants shall take effect upon the receipt by EPA of the payments required by Paragraph 51 of Section XVI (Reimbursement of Past Response Costs). With respect to future liability, these covenants shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 47(b) of Section XIV (Certification of Completion of the Remedial Action). These covenants are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants extend only to Settling Defendants, the Settling Defendants' parent or affiliate corporations providing the financial assurances required under Section XIII of this Consent Decree, the subsidiaries of such parent or affiliate corporations, and their respective officers, directors, and employees, and do not extend to any other person.

b. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided in Paragraphs 79, 80, and 82 of this Section, EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to Sections 106 and 107(a) and 113(f) of CERCLA and Sections 3004(u) and (v), 3008, and 7003 of RCRA relating to the Mine Flooding Site. Except with respect to future liability, these covenants shall take effect upon the receipt by EPA of the payments required by Paragraph 51 of Section XVI (Reimbursement of Response Costs). With respect to future liability, these

covenants shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 47(b) of Section XIV (Certification of Completion of the Remedial Action). These covenants are conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. These covenants extend only to the Settling Federal Agencies and do not extend to any other person.

c. State's Covenant. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Paragraphs 79, 80, and 82 of this Section, the State covenants not to sue or to take administrative action against Settling Defendants, the Settling Defendants' parent or affiliate corporations providing the financial assurances required under Section XIII of this Consent Decree, the subsidiaries of such parent or affiliate corporations, their respective officers, directors and employees, to the extent that the liability of such parent or affiliate companies, subsidiaries, officers, directors, and employees arises solely from their status as parent or affiliate companies, subsidiaries, officers, directors, and employees, pursuant to Sections 106, 107(a), and 113(f) of CERCLA, Sections 3004(u) and (v), 3008 and 7002 of RCRA, and Sections 711, 715, and 722 of CECRA, relating to the Mine Flooding Site. Except with respect to future liability, the covenants shall take effect upon the receipt by EPA of the payments required by Paragraph 51 of Section XVI (Reimbursement of Past Response Costs). With respect to future liability, these covenants shall take effect upon Certification of Completion of Remedial Action pursuant to Paragraph 47(b) of Section XIV (Certification of Completion of the Remedial Action). The covenants are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants, as

described in this Subparagraph, extend only to Settling Defendants, the Settling Defendants' parent or affiliate corporations providing the financial assurances required under Section XIII of this Consent Decree, the subsidiaries of such parent or affiliate corporations, their respective officers, directors, and employees, and do not extend to any other person.

d. United States' and the State's Mutual Covenants. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided in Paragraphs 79, 80, and 82 of this Section, and to the extent such authority exists, the State and the United States mutually covenant not to sue or take administrative action against each other pursuant to Sections 106, 107(a) and 113(f) of CERCLA and Sections 3004(u) and (v), 3008, 7002, and 7003 of RCRA, and Sections 711, 715, and 722 of CECRA, relating to the Mine Flooding Site. Except with respect to future liability, these covenants shall take effect upon the receipt by EPA of the payments required by Paragraph 56 of Section XVI (Reimbursement of Response Costs). With respect to future liability, these covenants shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 47(b) of Section XIV (Certification of Completion of Remedial Action). These covenants extend only to the State and the United States and do not extend to any other person.

79. a. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants, and EPA reserves the right to issue an administrative order seeking to compel Settling Federal Agencies:



- (i) to perform further response actions relating to the Mine Flooding Site; or
- (ii) to reimburse the United States for additional costs of response relating to the Mine Flooding Site

if, prior to Certification of Completion of the Remedial Action:

- A. conditions at the Mine Flooding Site, previously unknown to EPA, are discovered, or
- B. information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

b. State's Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants:

- (i) to perform further response actions relating to the Mine Flooding Site; or
- (ii) to reimburse the State for additional costs of response relating to the Mine Flooding Site

if, prior to Certification of Completion of the Remedial Action:

- A. conditions at the Mine Flooding Site, previously unknown to the State, are discovered, or
- B. information, previously unknown to the State, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

80. a. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies:

- (i) to perform further response actions relating to the Mine Flooding Site; or
- (ii) to reimburse the United States for additional costs of response relating to the Mine Flooding Site

if, subsequent to Certification of Completion of the Remedial Action:

- (A) conditions at the Mine Flooding Site, previously unknown to EPA, are discovered, or

- (B) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

b. State's Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants:

- (i) to perform further response actions relating to the Mine Flooding Site; or
- (ii) to reimburse the State for additional costs of response relating to the Mine Flooding Site

if, subsequent to Certification of Completion of the Remedial Action:

- (A) conditions at the Mine Flooding Site, previously unknown to the State, are discovered, or
- (B) information, previously unknown to the State, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

81. a. Information and Conditions Known to EPA. For purposes of Paragraph 79(a) (United States' Pre-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of lodging of this Consent Decree that are described or contained in: (1) the 1994 Record of Decision for the Mine Flooding Site; (2) the administrative record supporting the 1994 Record of Decision; (4) the Mine Flooding Site Record; (4) and the Butte Priority Soils Site Record; (5) the mine permit files maintained by DEQ or its predecessor agency under the Montana Metal Mines Reclamation Act pertaining to (A) the Response Decision Document (Appendix B to this Consent Decree), (B) sources of contamination, (C) groundwater, and (D) water treatment, in the permitted mine area within the Butte Active Mine Area Operable Unit; and (6) any other records relating to the Mine Flooding Site or Butte Priority Soils Operable Unit maintained by EPA and its employees. For purposes of Paragraph 80(a) (United States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of EPA's acceptance of Settling Defendants' Certification of Completion of the Remedial Action and described or contained in: (1) the 1994 Record of Decision for the Mine Flooding Site; (2) the administrative record supporting the 1994 Record of Decision; (3) the Mine Flooding Site Record; (4) and the Butte Priority Soils Site Record; (5) any other records relating to the Mine Flooding Site or Butte Priority Soils Operable Unit maintained by EPA and its employees; (6) the mine permit files maintained by DEQ or its

predecessor agency under the Montana Metal Mines Reclamation Act pertaining to (A) the Response Decision Document, (B) sources of contamination, (C) groundwater, and (D) water treatment, in the permitted mine area within the Butte Active Mine Area Operable Unit; and (7) any other information received or discovered by EPA pursuant to the requirements of this Consent Decree. For purposes of Paragraphs 79(a) and 80(a), the fact that the Remedial Action has failed shall not constitute, in and of itself, an unknown condition or new information, unless the failure of the Remedial Action results from an unknown condition or new information.

b. Information and Conditions Known to the State. For purposes of Paragraph 79(b) (State's Pre-Certification Reservations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of the date of lodging of this Consent Decree that are described or contained in: (1) the 1994 Record of Decision for the Mine Flooding Site; (2) the administrative record supporting the 1994 Record of Decision; (4) the Mine Flooding Site Record; (4) and the Butte Priority Soils Site Record; (5) the mine permit files maintained by DEQ or its predecessor agency under the Montana Metal Mines Reclamation Act pertaining to (A) the Response Decision Document, (B) sources of contamination, (C) groundwater, (D) water treatment, and (E) mine reclamation, in the permitted mine area within the Butte Active Mine Area Operable Unit; and (6) any other records relating to the Mine Flooding Site or Butte Priority Soils Operable Unit maintained by the State and its employees. For purposes of Paragraph 80(b) (State's Post-Certification Reservations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of EPA's acceptance of Settling Defendants' Certification of Completion of

the Remedial Action and described or contained in: (1) the 1994 Record of Decision for the Mine Flooding Site; (2) the administrative record supporting the 1994 Record of Decision; (3) the Mine Flooding Site Record; (4) and the Butte Priority Soils Site Record; (5) any other records relating to the Mine Flooding Site or Butte Priority Soils Operable Unit maintained by the State and its employees; (6) the mine permit files maintained by DEQ or its predecessor agency under the Montana Metal Mines Reclamation Act pertaining to (A) the Response Decision Document, (B) sources of contamination, (C) groundwater, (D) water treatment, and (E) mine reclamation, in the permitted mine area within the Butte Active Mine Area Operable Unit; and (7) any other information received or discovered by the State pursuant to the requirements of this Consent Decree. For purposes of Paragraphs 79(b) and 80(b), the fact that the Remedial Action has failed shall not constitute, in and of itself, an unknown condition or new information, unless the failure of the Remedial Action results from an unknown condition or new information.

82. a. United States' General Reservations of Rights. The covenants set forth in Paragraph 78 do not pertain to any matters other than those expressly specified in Paragraph 78. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants and Settling Federal Agencies with respect to all other matters, including but not limited to, the following:

(i) claims to enforce this Consent Decree based on a failure by Settling Defendants or the Settling Federal Agencies to meet a requirement of this Consent Decree;

(ii) liability for response costs and injunctive relief under CERCLA Sections 106 and 107 arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Mine Flooding Site, other than as provided in the ROD or the Work;

(iii) liability for response costs and injunctive relief under CERCLA Sections 106 and 107 for future acts of disposal of Waste Material at the Mine Flooding Site by Settling Defendants, other than as provided in the ROD, the Work, or otherwise ordered by EPA;

(iv) criminal liability;

(v) liability for violations of federal or state law by Settling Defendants which occur during or after implementation of the Remedial Action;

(vi) liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Additional Response Actions) because they are outside the scope of the remedial action. The rights reserved under this Subparagraph 82(a)(vi) shall be exercised only in a separate administrative or judicial proceeding, and the costs incurred by EPA for these response actions shall not be considered Future Response Costs recoverable under this Consent Decree; and

(vii) liability for damages for injury to, destruction of, or loss of natural resources and for the costs of any natural resource damage assessments at the Mine

Flooding Site against the MR Group, and liability for the natural resource damages claims against ARCO that are reserved in Paragraph 77 of the Streamside Tailings Consent Decree.

b. State's General Reservations of Rights. The covenants set forth in Paragraph 78 do not pertain to any matters other than those expressly specified in Paragraph 78. The State reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to, the following:

(i) claims to enforce this Consent Decree based on a failure by Settling Defendants to meet a requirement of this Consent Decree;

(ii) liability for response costs and injunctive relief under CERCLA Sections 106 and 107, or parallel provisions of state law, arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Mine Flooding Site, other than as provided in the ROD or the Work;

(iii) liability for response costs and injunctive relief under CERCLA Section 106 and 107, or parallel provisions of state law, for future acts of disposal of Waste Material at the Site by Settling Defendants, other than as provided in the ROD, the Work, or otherwise ordered by EPA;

(iv) criminal liability;



(v) liability for violations of federal or state law by Settling Defendants which occur during or after implementation of the Remedial Action; and

(vi) liability, prior to Certification of Completion of the Remedial Action, for additional response actions that the State determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Additional Response Actions) because they are outside the scope of the remedial action. The rights reserved under this Subparagraph 82(a)(vi) shall be exercised only in a separate administrative or judicial proceeding, and the costs incurred by the State for these response actions shall not be considered Future Response Costs recoverable under this Consent Decree;

(vii) liability for damages for injury to, destruction of, or loss of, natural resources and for the costs of assessing and litigating any claims for such natural resource damages at the Mine Flooding Site against the MR Group; and

(viii) liability for damages for injury to, destruction of, or loss of, natural resources and for the costs of assessing and litigating any claims for such natural resource damages at the Mine Flooding Site against ARCO to the extent that such claims were reserved in the Montana v. ARCO consent decree, which was entered by this Court in State of Montana v. Atlantic Richfield Company, Case No. 83-317-HLN-PGH, on April 19, 1999, or in the Streamside Tailings Consent Decree.

83. Work Takeover In the event EPA, in consultation with the State, determines that Settling Defendants have ceased implementation of any portion of the Work, are

seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 67, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs paid by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Reimbursement of Response Costs).

84. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

## XXII. COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES

85. a. Settling Defendants' Covenant Not to Sue the United States. Subject to the reservations in Paragraph 87, Settling Defendants hereby covenant not to sue and agree not to assert any past, present, or future claims or causes of action against the United States, its agencies, instrumentalities, officials, employees, agents, and contractors relating to the Mine Flooding Site, as defined herein, including:

(i) any direct or indirect claim related to the Mine Flooding Site for reimbursement from the Hazardous Substance Superfund (established pursuant to the

Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

(ii) any claims under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613, under RCRA Sections 3004(u) and (v), 3008 and 7002, or under CECRA, including Sections 711, 715, 719, 722, and 724, MCA 75-10-711, 75-10-715, 75-10-719, 75-10-722, 75-10-724, and any other theory of recovery or provision of law related to the Mine Flooding Site; or

(iii) any claims arising out of response activities at the Mine Flooding Site, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities.

b. Settling Defendants' Covenant Not to Sue the State. Subject to the reservations in Paragraph 87, Settling Defendants hereby covenant not to sue and agree not to assert any past, present, or future claims or causes of action against the State, its agencies, instrumentalities, officials, employees, agents, and contractors relating to the Mine Flooding Site, as defined herein, including:

(i) any direct or indirect claim related to the Mine Flooding Site for reimbursement from the Environmental Quality Protection Fund (established pursuant to MCA 75-10-704), the Orphan Share Account (established pursuant to MCA 75-10-743), or any other provision of law;

(ii) any claims under CERCLA Sections 107 or 113, 42 U.S.C. Sections 9607 and 9613, under RCRA Sections 3004(u) and (v), 3008 and 7002, and under

CECRA Sections 711, 715, 719, 722, and 724, MCA 75-10-711, 75-10-715, 75-10-719, 75-10-722, 75-10-724, and any other theory of recovery or provision of law related to the Mine Flooding Site; or

(iii) any claims arising out of response activities at the Mine Flooding Site, including claims based on selection of response actions, oversight of response actions, or approval of plans for such actions.

86. Settling Federal Agencies' Covenant Not to Sue. Settling Federal Agencies hereby agree not to assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Service Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law with respect to the Mine Flooding Site including reimbursement from the State Environmental Quality Protection Fund and the State Orphan Share Account. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as a lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).

87. Settling Defendants' Reservation of Rights. Settling Defendants reserve, and this Consent Decree is without prejudice to:

a. claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and claims against the State under Chapter 9 of Title 2 of Montana Code Annotated for money damages for injury or loss of property or

personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States or the State while acting within the scope of his office or employment under circumstances where the United States or the State, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671, or an employee, as that term is defined in 2-9-101, MCA; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any Federal or State statute other than CERCLA or CECRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or CECRA.

b. Contribution and other claims and counterclaims against the Settling Federal Agencies in the event that any claim is asserted by the United States or the State against Settling Defendants under Paragraph 79 (United States' and State's Pre-Certification Reservations), Paragraph 80 (United States' and State's Post-Certification Reservations), Paragraph 82 (United States' and State's General Reservation of Rights) or Paragraph 84 (United States' and State's Reservation of Response Authority), but only for contribution and other claims and counterclaims arising from the same matters, transactions, or occurrences that are raised in or directly related to the United States' or the State's claims against Settling Defendants;

c. except as otherwise expressly provided by this Consent Decree, the Streamside Tailings Consent Decree, or the Rocker Consent Decree, contribution and other claims and counterclaims raised by Settling Defendants in the Federal action against the United States for response costs at operable units other than the Mine Flooding Site;

d. any claims or counterclaims by Settling Defendants other than ARCO against the State which are not expressly released or limited in this Consent Decree. For ARCO, any claims or counterclaims by ARCO against the State which are (i) expressly reserved in Paragraph 24 of the Consent Decree entered in the State Action on April 19, 1999, (ii) not released in the Streamside Tailings Consent Decree, and (iii) not expressly released or limited in this Consent Decree.

e. for Settling Defendants other than ARCO, except as otherwise expressly provided in this Consent Decree, all of their defenses to the claims reserved by the United States and the State in this Consent Decree. For ARCO, except as otherwise expressly provided by this Consent Decree or released or limited in the consent decree previously entered by this Court pertaining to the State Action, the Streamside Tailings Consent Decree, or the Rocker Consent Decree, all of its defenses to the claims reserved by the United States and the State in this Consent Decree.

88. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

89. Settling Defendants agree not to assert any claims and to waive all CERCLA, CECRA, and RCRA claims or causes of action that they may have for all matters relating to the Mine Flooding Site, including for contribution, against any person where the person's liability to Settling Defendants or Settling Federal Agencies with respect to the Mine Flooding Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Mine Flooding Site, or having accepted for transport for disposal or treatment of hazardous substances at the Mine Flooding Site, if:

a. the materials contributed by such person to the Mine Flooding Site containing hazardous substances (i) did not exceed the greater of (A) 0.002% of the total volume of waste at the Mine Flooding Site or (B) 110 gallons of liquid materials or 200 pounds of solid materials; or (ii) consist of ongoing or approved stormwater diversions.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Mine Flooding Site by such person contributed or could contribute significantly to the costs of response at the Site, or if EPA has named such parties as potentially responsible parties for the Mine Flooding Site pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607. This waiver shall be void to the extent that the United States or the State institutes a new action, or issues a new administrative order to Settling Defendants, pursuant to Paragraph 82 (General Reservation of Rights) of this Consent Decree. This waiver also shall not apply with respect to any defense, claim, or cause of action that Settling Defendants or the Settling Federal Agencies may have against any person if such person asserts a claim or

cause of action relating to the Mine Flooding Site against Settling Defendants or the Settling Federal Agencies.

### XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

90. Except as provided in Paragraph 89, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Except as provided in Paragraph 89, each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the matters addressed in this Consent Decree against any person not a Party hereto.

91. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants and the Settling Federal Agencies are entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for matters addressed in this Consent Decree. The Parties also agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by CECRA Section 719(1), MCA 75-10-719(1), for matters addressed in this Consent Decree. For purposes of this Paragraph, the “matters addressed” in this Consent Decree include all Past and Future Response Costs and Work, as defined herein, as well as all response actions taken and to be



taken, including, without limitation, remedial investigation, feasibility study, remedial design and remedial action work undertaken by Settling Defendants at the Mine Flooding Site prior to the entry of the Decree. The Parties agree that the contribution protection set forth in this Paragraph is intended to provide the broadest protection afforded by CERCLA and CECRA for matters addressed in this Consent Decree.

92. Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States and the State in writing no later than sixty (60) days prior to the initiation of such suit or claim.

93. Settling Defendants also agree that, with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree, they will notify in writing the United States and the State within ten (10) days of service of the complaint on them. In addition, Settling Defendants shall notify the United States and the State within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

94. a. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Mine Flooding Site, or other claims reserved in Paragraph 82, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in

the Federal Action or in the State Action; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by United States and State).

b. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Mine Flooding Site, or other claims reserved in Paragraph 82, neither the United States nor the State shall use any provision of this Consent Decree to assert and maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by Settling Defendants in the subsequent proceeding were or should have been brought in the Federal Action or in the State Action; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXII (Covenants by Settling Defendants and Settling Federal Agencies).

#### XXIV. ACCESS TO INFORMATION

95. Subject to the assertion of privilege claims in accordance with Paragraph 96, Settling Defendants shall provide to EPA and the State, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to the Mine Flooding Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, and correspondence; provided, however, that Settling Defendants shall not be required to re-produce any documents already provided to the United States. In response to reasonable requests by EPA, in

consultation with the State, Settling Defendants shall cooperate in making available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work, subject to their right to counsel or any other right under State and Federal law.

96. a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to the United States, EPA, or the State under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to the United States, EPA, or the State, if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by state or federal law. If Settling Defendants assert such a privilege in lieu of providing documents over which it asserts a privilege, and if Settling Defendants have not previously provided a privilege log to the United States for the documents subject to the request, Settling Defendants shall provide the United States and/or EPA, and the State, with the following: (1) the title of the document, record, or information; (2) the date of the

document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information Settling Defendants are required to create or generate by this Consent Decree shall be withheld on the grounds that they are privileged.

97. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other non-privileged documents or information evidencing conditions relating to the Mine Flooding Site.

98. Nothing in this Section shall require Settling Defendants to produce any documents, records, or other information that Settling Defendants have previously produced to the United States, although Settling Defendants shall cooperate with the United States to identify the approximate date(s) such previous production or other information to assist the United States in locating previously produced documents.

## XXV. RETENTION OF RECORDS

99. Until 5 years after Settling Defendants' receipt of EPA's notification pursuant to Paragraph 47(b) of Section XIV (Certification of Completion of the Remedial Action), Settling Defendants shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate to the Mine Flooding Site Work or liability of any person for response actions conducted and to be

conducted at the Mine Flooding Site, regardless of any corporate retention policy to the contrary. Settling Defendants shall also instruct their contractors and agents to preserve all documents and records relating to the performance of the Work at the Mine Flooding Site.

100. At the conclusion of this document retention period, Settling Defendants shall notify the United States and the State at least ninety (90) days prior to the destruction of any such records or documents. Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by state or federal law. If a Settling Defendant asserts such a privilege, it shall provide the United States and the State with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by the Settling Defendant. However, no final documents, reports or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged.

101. Settling Defendants each hereby certify that, to the best of their knowledge and belief, after thorough inquiry, they have not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to their potential liability or the potential liability of any other Settling Defendant regarding the Mine Flooding Site since the notification of potential liability by the United State or the State, and that they have fully complied with any and all EPA requests for information pursuant to Section

104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

102. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has fully complied with any and all EPA and State requests for information pursuant to Section 104(e) and 122(e) of CERCLA 42 U.S.C. Section 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. Section 6927.

## XXVI. NOTICES AND SUBMISSIONS

103. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to or upon another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Except as otherwise specifically provided, written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to the United States, EPA, or the State, the Settling Federal Agencies, and Settling Defendants, respectively.

### As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ #90-11-2-430  
and

Director, Montana Office  
U.S. Environmental Protection Agency  
Region 8 Montana Office  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, Montana 59624

As to the Settling Federal Agencies:

Mike Zevenbergen, Trial Attorney  
Environmental Defense Section  
c/o NOAA Damage Assessment  
7600 Sand Point Way, NE  
Seattle, Washington 98115

As to EPA:

Russ Forba  
EPA Project Coordinator  
U.S. Environmental Protection Agency  
Region 8 Montana Office  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, Montana 59624

D. Henry Elsen, Attorney  
U.S. Environmental Protection Agency  
Region 8 Montana Office  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, Montana 59624

As to the State or DEQ:

Daryl Reed  
State Project Officer  
Mine Flooding CERCLA Site  
Department of Environmental Quality  
Remediation Division  
P.O. Box 200901  
Helena, Montana 59620-0901

Mary Capdeville  
CERCLA Site Attorney  
Mine Flooding CERCLA Site  
Department of Environmental Quality  
Legal Unit (Remediation)  
P.O. Box 200901

Helena, Montana 59620-0901

As to Settling Defendants:

Barry C. Duff  
Project Coordinator  
Atlantic Richfield Company  
307 E. Park Avenue  
Anaconda, Montana 59711

David Bell, Esq.  
Atlantic Richfield Company  
801 Warrenville Road, Suite 800  
Lisle, Illinois 60532

Stephen F. Walsh, President  
Montana Resources  
600 Shields Avenue  
Butte, Montana 59701

Greg L. Stricker, Vice President  
Montana Resources, Inc.  
101 International Way  
Missoula, Montana 59808

Larry Simkins  
On Behalf of Dennis R. Washington  
P.O. Box 16630  
Missoula, Montana 59808-6630

Rebecca L. Summerville, Esq.  
On Behalf of Dennis R. Washington  
Datsopoulos, MacDonald & Lind, P.C.  
201 West Main  
Central Square Building  
Missoula, Montana 59802

Kevin McCaffrey, Esq.  
ASARCO, Incorporated  
156 West 56<sup>th</sup> Street  
Suite 1902



New York, New York 10019

Kevin McCaffrey, Esq.  
AR Montana Corporation  
156 West 56<sup>th</sup> Street  
Suite 1902  
New York, New York 10019

XXVII. AGREEMENT ON POOL COSTS FOR FUTURE NEGOTIATIONS

104. This Consent Decree represents the conclusion of negotiations described in Paragraph 31(b) of the Streamside Tailings Consent Decree, which was entered by the District Court of Montana in the Federal Action and in State of Montana v. Atlantic Richfield Company, CV 83-317-HLN-PGH on April 19, 1999.

105. Paragraph 31 of the Streamside Tailings Consent Decree also requires ARCO and the United States to conduct additional consent decree negotiations for other operable units and matters in the Original and Butte Portions of the Silver Bow Creek/Butte Area National Priorities List (NPL) Site,. These matters include, as appropriate, the amount of allocated Silver Bow Creek/Butte Area (Butte portion) site-wide costs (Paragraphs 31(e) through 31(f) of the Streamside Tailings Consent Decree). For purposes of Paragraphs 31(b) and 31(e) through 31(f) of the Streamside Tailings Consent Decree, the United States and ARCO agree that \$3,016,018.23 represents the past response costs paid by EPA through March, 1998, including interest, for the Butte portion of the SBCB Site-wide costs. In future negotiations conducted pursuant to Paragraphs 31(c) through 31(f) of the Streamside Tailings Consent Decree, the United States and ARCO further agree that this \$3,016,018.23 in past response costs paid by EPA through March, 1998, in addition to the

Clark Fork General costs allocated to the Silver Bow Creek/Butte Area (Butte Portion) accounts as described in Paragraph 106 of the Rocker Operable Unit Consent Decree, shall be allocated as follows: 62.50049% to Operable Unit 8 (Butte Priority Soils), which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 10.58385% to Operable Unit 10 (Butte Residential Soils) which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 3.43335% to Operable Unit H (Stormwater TCRA) which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 0.33120% to Operable Unit I (Railroad TCRA), which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 0% to Operable Unit J (Butte Residential Removal), which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; and 0% to Operable Unit 13 (Butte Westside Soils), which will be addressed in the negotiations described in Paragraph 31(f) of the Streamside Tailings Consent Decree.

106. For purposes of Paragraphs 31(b) through 31(f) of the Streamside Tailings Consent Decree, the United States and ARCO agree that \$624,083.67 represents the past costs paid by EPA for the period 4/1/98 through March 31, 2000, including interest, for Clark Fork General Costs. In future negotiations conducted pursuant to Paragraphs 31(c) through 31(f) of the Streamside Tailings Consent Decree, the United States and ARCO further agree that 34.99209% of these costs shall be allocated to the Anaconda Smelter site account, 25.99500% to the Milltown Reservoir site account, 11.15324% to the Silver Bow Creek / Butte Area (Original Portion) site account, and 27.85967% to the Silver Bow Creek / Butte Area (Butte Portion) site account.

107. For purposes of Paragraphs 31(b) through 31(f) of the Streamside Tailings Consent Decree, the United States and ARCO agree that \$97,412.26 represents the past response costs paid by EPA for the period 4/1/98 through March 31, 2000, including interest, for the Butte portion of the SBCB Site-wide costs. In future negotiations conducted pursuant to Paragraphs 31(c) through 31(f) of the Streamside Tailings Consent Decree, the United States and ARCO further agree that this \$97,412.26, in addition to the Clark Fork General costs allocated to the Silver Bow Creek / Butte Area (Butte Portion) as described in Paragraph 106 of this Consent Decree, shall be allocated as follows: 48.12468% to Operable Unit 8 (Butte Priority Soils), which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 4.51558% to Operable Unit 10 (Butte Residential Soils) which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 0.13596% to Operable Unit 13 (Butte West Side Soils), which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree; 15.02453% to Operable Unit H (Stormwater TCRA); 17.74581% to Operable Unit I (Railroad TCRA) of the Streamside Tailings Consent Decree; and 0.14959% to Operable Unit J (Butte Residential Removal), which will be addressed in the negotiations described in Paragraph 31(e) of the Streamside Tailings Consent Decree.

108. In the course of the future consent decree negotiations pursuant to Section VII of the Streamside Tailings Consent Decree, including modifications to that Section, Settling Defendants shall not challenge the amount of costs claimed by the United States and set forth in Paragraphs 105 through 107 on any basis, including inconsistency with the National Contingency Plan, adequacy of documentation, or accounting error. The dollar

amounts stated in Paragraphs 105 through 107 are sum total amounts of individual costs identified and specifically negotiated in the negotiations relating to this Consent Decree and shall not be altered by EPA in future negotiations.

109. With the exception of the Interim Response Costs and Oversight Costs, this Consent Decree does not settle the United State's claim for Clark Fork General or Silver Bow Creek/Butte Area (Butte portion) Site Wide response costs paid by EPA after March 31, 2000.

110. The amounts and allocation percentages agreed to by the United States and Settling Defendants in this Section are for settlement purposes only, and nothing in Section XXVII may be used by any Party as evidence in any litigation between the United States and Settling Defendants.

#### XXVIII. RETENTION OF JURISDICTION

111. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

#### XXIX. APPENDICES

112. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the 1994 Record of Decision and the 2002 Explanation of Significant Differences.

"Appendix B" is the Response Decision Document.

"Appendix C" is the Statement of Work.

### XXX. EFFECTIVE DATE

The Effective Date of this Consent Decree shall be 60 days from the date that this District Court enters the Consent Decree, unless an appeal of the entry and judgment is filed during the 60-day period; if an appeal is taken, the Effective Date shall mean the date on which the District Court's judgment is affirmed.

### XXXI. COMMUNITY RELATIONS

113. Settling Defendants shall propose to EPA, in consultation with the State, Settling Defendants' participation in any amendment to the community relations plan developed by EPA for the Mine Flooding Site. EPA, in consultation with the State, will determine the appropriate role for Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA and the State in providing information regarding the Work to the public. As requested by EPA and the State, Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which

may be held or sponsored by EPA or the State to explain activities at or relating to the Mine Flooding Site.

#### XXXII. MODIFICATION

114. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA, in consultation with the State, and Settling Defendants. All such modifications shall be made in writing.

115. Except as provided in Paragraph 14 ("Additional Response Actions"), no material modifications shall be made to the plans and documents required under this Consent Decree without written notification to and written approval of the United States, Settling Defendants, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to a plan or document that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and Settling Defendants.

116. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

#### XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

117. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of

CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States and the State reserve their rights to withdraw or withhold their consent if (a) the comments regarding this Consent Decree, or (b) the review by the United States and the State of BP Corporation North America Inc.'s supplemental demonstration of financial assurance required by Paragraph 45(a), disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

118. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of this Consent Decree may not be used as evidence in any litigation between the Parties.

119. Upon entry of this Consent Decree, EPA will terminate Administrative Order on Consent Docket Nos. CERCLA-VIII-90-09 and CERCLA VIII-89-19 and Unilateral Administrative Order Docket No. CERCLA-VIII- 96-19.

#### XXXIV. SIGNATORIES / SERVICE

120. The undersigned representatives of Settling Defendants, the Environment and Natural Resources Division of the United States Department of Justice, the United States Environmental Protection Agency, and the Montana Department of Environmental Quality each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

121. Each Party hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States or the State has notified Settling Defendants in writing that it no longer supports entry of this Consent Decree.

122. Settling Defendants shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

123. Upon the Court's approval of this Consent Decree, the Decree shall be entered as a final judgment under Fed. R. Civ. P. 54(b), and shall serve to satisfy the settlement negotiation requirements contained in paragraph 31(b) of the Streamside Tailings Consent Decree with respect to the Mine Flooding Site. The Court expressly determines that there is no just reason for delay in entering this judgment.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2002.

\_\_\_\_\_  
UNITED STATES DISTRICT COURT JUDGE



THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Mine Flooding Site in the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

**FOR THE UNITED STATES OF AMERICA:**

Date: \_\_\_\_\_

\_\_\_\_\_  
JOHN C. CRUDEN  
Deputy Assistant Attorney General  
Environment & Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: \_\_\_\_\_

\_\_\_\_\_  
MATTHEW W. MORRISON  
Trial Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Mine Flooding Site in the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

Date: \_\_\_\_\_

MICHAEL J. ZEVENBERGEN  
Environmental Defense Section  
c/o NOAA Damage Assessment  
7600 Sand Point Way, NE  
Seattle, Washington 98115

Date: \_\_\_\_\_

\_\_\_\_\_  
KRIS MCLEAN  
Assistant United States Attorney  
District of Montana  
105 East Pine, 2<sup>nd</sup> Floor  
Missoula, Montana 59802

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Butte Mine Flooding Operable Unit of the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

Date: \_\_\_\_\_

\_\_\_\_\_  
JOHN F. WARDELL  
Region 8 Montana Office Director  
U.S. Environmental Protection Agency  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, MT 59626-0096

Date: \_\_\_\_\_

\_\_\_\_\_  
CAROL RUSHIN  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and Environmental  
Justice  
U.S. Environmental Protection Agency, Region 8  
999 18<sup>th</sup> Street  
Denver, Colorado 80202

Date: \_\_\_\_\_

\_\_\_\_\_  
D. HENRY ELSEN, Attorney  
Legal Enforcement Program  
U.S. Environmental Protection Agency  
Region 8 Montana Office  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, MT 59624

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Butte Mine Flooding Operable Unit of the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

**FOR THE STATE OF MONTANA:**

Date: \_\_\_\_\_

\_\_\_\_\_  
JAN P. SENSIBAUGH, Director  
Montana Dept. of Environmental Quality  
Metcalf Building  
P.O. Box 20091  
Helena, Montana 59620-0901

Date: \_\_\_\_\_

\_\_\_\_\_  
MARY CAPDEVILLE  
Special Assistant Attorney General  
Montana Dept. of Environmental Quality  
Metcalf Building  
P.O. Box 20091  
Helena, Montana 59620-0901

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Butte Mine Flooding Operable Unit of the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

**FOR THE ATLANTIC RICHFIELD COMPANY:**

Date: \_\_\_\_\_

\_\_\_\_\_  
David Bell, Esq.  
BP America, Inc.  
801 Warrenville Road, Suite 800  
Lisle, Illinois 60532

Date: \_\_\_\_\_

\_\_\_\_\_  
Steven Foster  
Holland and Hart  
P.O. Box 639  
401 North 31<sup>st</sup> Street, Suite 1500  
Billings, Montana 59711

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Butte Mine Flooding Operable Unit of the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

**FOR ASARCO:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Genaro Larrea Mota-Velasco, President  
ASARCO Incorporated  
2575 East Camelback Road, Suite 500  
Phoenix, Arizona 85016

**FOR AR MONTANA CORPORATION:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Genaro Larrea Mota-Velasco, President  
AR Montana Corporation  
2575 East Camelback Road, Suite 500  
Phoenix, Arizona 85016

**FOR MONTANA RESOURCES:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Stephen F. Walsh, President  
Montana Resources  
600 Shields Avenue  
Butte, Montana 59701

**FOR MONTANA RESOURCES, INC:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Greg L. Stricker, Vice President  
Montana Resources, Inc.  
101 International Way  
Missoula, Montana 59808

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Butte Mine Flooding Operable Unit of the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

**FOR DENNIS WASHINGTON:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Dennis Washington  
P.O. Box 16630  
Missoula, Montana 59808-6630

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Atlantic Richfield Company, Civ. No. \_\_\_\_\_ relating to the Mine Flooding Site in the Silver Bow Creek/Butte Area (Butte Portion) Superfund Site.

**FOR THE MR GROUP:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Rebecca L. Summerville, Esq.  
Datsopoulos, MacDonald & Lind, P.C.  
201 West Main  
Central Square Building  
Missoula, Montana 59802